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Steven G. Calabresi

Lena M. Barsky

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An Originalist Defense of *Plyler v. Doe*

Steven G. Calabresi* & Lena M. Barsky**

This Article offers a defense of the Supreme Court's opinion in Plyler v. Doe based on the original public meaning of the Fourteenth Amendment when it was enacted in 1868. We argue that at that time, the Fourteenth Amendment granted certain rights, such as life, liberty, and possession of personal property, to immigrants under the Equal Protection and Due Process Clauses, but did not grant them the privileges and immunities of citizenship (e.g. all civil rights and the political right to vote). We also argue that public education is a right of all persons protected by the Due Process and Equal Protection Clauses and was protected at the time of the Fourteenth Amendment's ratification. We thus conclude that the Fourteenth Amendment granted a free public school education to both citizens and immigrants from July 9, 1868, onward.

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* Clayton J. and Henry R. Barber Professor of Law, Northwestern University; Visiting Professor of Law, Yale University, and Visiting Professor of Political Theory, Brown University. We would like to begin by thanking John Tomasi, the Brown University Political Science Department, the Political Theory Project, and Northwestern Law School for creating the working environment that made it possible for us to write this Article. We have also benefitted from the comments of Dan Rodriguez, Erin Delaney, and of students who read this article in draft at Roger Williams University School of Law. We would also like to acknowledge the work of John Harrison, whose article, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992), shed new light on the Fourteenth Amendment and has helped shape our philosophy about the Fourteenth Amendment's meaning. Without his research, we could not have written this Article.

** B.A., 2014, Brown University. Program Associate at the National Judicial Education Program, a project of Legal Momentum in cooperation with the National Association of Women Judges.

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*"I submit that, when it declares that no State shall deprive any person of the equal protection of the laws, it means substantially that no person shall be deprived by a State of the equal benefit of the laws; that the word 'protection,' as there used, means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law"*¹

*"The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority."*²

I. INTRODUCTION

The U.S. Supreme Court held in *Plyler v. Doe* that state laws and regulations that discriminated against illegal aliens should be subject to the rational basis test under the Equal Protection Clause.³ In *Plyler*, a group of Mexican children who had illegally entered the United States with their families and who were living in Texas "complained of the exclusion . . . from the public schools of the Tyler Independent School District."⁴ These children had been excluded from a free public-school education under a May 1975 revision to Texas's education laws,⁵ which allowed local school districts to "deny enrollment in their public schools to children not 'legally admitted' to the country."⁶ The Court held, in an opinion written by Justice Brennan, "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."⁷ In other words, the children's status as illegal aliens did not, by itself, afford the State a sufficient rational basis for denying them the benefit

1. CONG. GLOBE, 42d Cong., 2d Sess. 847 (1872) (statement of Sen. Morton, R-IN).

2. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (statement of Rep. Hotchkiss, R-NY).

3. *Plyler v. Doe*, 457 U.S. 202 (1982).

4. *Id.* at 206.

5. TEX. EDUC. CODE ANN. § 21.031 (West 1995) (repealed 1995) (current version at TEX. EDUC. CODE ANN. § 25.001), *declared unconstitutional by Plyer v. Doe*, 457 U.S. 202 (1982).

6. *Plyler*, 457 U.S. at 205 (quoting TEX. EDUC. CODE ANN. § 21.031 (West 1981) (repealed 1995) (current version at TEX. EDUC. CODE ANN. § 25.001)).

7. *Id.* at 230.

of a public school education that was afforded as of right to other children in Texas who were not illegal aliens.⁸

The Supreme Court said that no national policy goals were served by allowing Texas to deny children who were illegal aliens an elementary school education and that the statute did not further any substantial state goal.⁹ With *Plyler*, as with other cases discussed in this Article, the Court essentially followed a Lochnerian approach to the Fourteenth Amendment even though it used the post-New Deal rational basis test and the concept of “strict scrutiny.” The Court has decided other cases regarding the rights of aliens (noncitizens) against state governments along similar lines.¹⁰ Our goal here is to determine if *Plyler v. Doe* and other U.S. Supreme Court precedents dealing with discrimination by the states on the basis of alienage are consistent with the original public meaning of the Fourteenth Amendment, as it was understood when it was ratified in 1868.

Originalism is a theory of constitutional interpretation that has been championed by the late U.S. Supreme Court Justice Antonin Scalia,¹¹ Justice Clarence Thomas, former Judge Robert H. Bork,¹² and former Attorney General Edwin Meese III.¹³ Professor Calabresi has also commented on originalism in a law review article titled *Originalism and Loving v. Virginia*,¹⁴ and our comments here draw on and paraphrase that article in various places.

8. See *id.* at 228–30. A note on verbiage: In using the term “illegal alien,” we do not mean to disparage these children in any way and are merely following both popular word usage and the language used in *Plyler*. We reject that term and its negative connotations; however, because of the historical documents and case law quoted in this Article, we must use the term to some extent. In using the phrase “illegal alien,” we do not intend to offend any of our readers, and we ourselves favor immigration reform.

9. *Id.* at 227–28.

10. See *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In Part IV, we analyze these cases using the same originalist theory applied to *Plyler v. Doe*.

11. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

12. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

13. See Edwin Meese III, *The Law of the Constitution*, in *ORIGINALISM: A QUARTER CENTURY OF DEBATE* 99, 99–109 (Steven G. Calabresi ed., 2007).

14. Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393.

Originalism posits that the constitutional text should be interpreted according to the original public meaning of the words when the Constitution, or its amendments, were ratified. Since the Fourteenth Amendment was ratified in 1868, the original public meaning of the Fourteenth Amendment requires that we determine what the amendment meant objectively to reasonable readers of American English in 1868. This “original public meaning” can be uncovered by looking at dictionaries, grammar books, and other benchmarks of objective public meaning that were publicly available in 1868.¹⁵

Many critics of originalism, such as Richard Posner, Cass Sunstein, Jack Balkin, and Michael Klarman, claim that a key weakness of the Scalia-Thomas theory of judging is its supposed inability to explain and justify a number of post-1954 foundational Fourteenth Amendment cases.¹⁶ Among the Fourteenth Amendment cases that originalism allegedly cannot explain are *Brown v. Board of Education*;¹⁷ *Loving v. Virginia*;¹⁸ *United States v. Virginia*¹⁹ (more commonly known as the VMI sex discrimination case); and *Trimble v. Gordon*,²⁰ which applied the Equal Protection Clause to classifications based on illegitimacy. These cases all grew out of the famous “footnote four” in *United States v. Carolene Products Co.*²¹ In that case, the Supreme Court repudiated *Lochner*-style judicial activism²² except when it

15. See *supra* notes 11–13.

16. See JACK M. BALKIN, *LIVING ORIGINALISM* (2011); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); RICHARD A. POSNER, *OVERCOMING LAW* (1995); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005); see also Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995).

17. 347 U.S. 483 (1954).

18. 388 U.S. 1 (1967).

19. 518 U.S. 515 (1996).

20. 430 U.S. 762 (1977).

21. 304 U.S. 144 (1938).

22. During the *Lochner* era, the Supreme Court balanced civil rights, like liberty of contract, against the state governments’ police power to pass just laws for the general good of the people. The Supreme Court asked in *Lochner v. New York*, 198 U.S. 45 (1905), whether a sixty-hour workweek limitation imposed on bakers was reasonable given the health hazards associated with being a baker. The Supreme Court, in a 5–4 decision, held that the New York law was unreasonable and therefore unconstitutional. *Id.*

In 1938, in *Caroline Products*, the Supreme Court declared that henceforth it would not ask if economic or social regulation was unreasonable but only whether it had some “rational basis.”

was protecting (1) rights secured in the federal Bill of Rights; (2) rights of discrete and insular minorities who were the victims of prejudice; and (3) access to the democratic process. It has long been assumed that federal judicial protection of discrete and insular minorities who are not U.S. citizens—like illegal aliens—is a form of Lochnerian judicial activism that is inconsistent with the rational basis test and the Constitution. That assumption turns out to be deeply mistaken under our originalist interpretation of the Fourteenth Amendment.

A proper application of Scalia-style originalism and textualism shows that the U.S. Supreme Court's decision in *Plyler v. Doe* was correctly decided based on the original public meaning of the words of the Fourteenth Amendment in 1868. We begin our analysis in Part I by discussing the historical origins and the original public meaning of the Civil Rights Act of 1866 and the Fourteenth Amendment. We show that the Reconstruction framers specifically considered how and whether to protect illegal aliens in both the Civil Rights Act of 1866 and the Fourteenth Amendment. They used great care in defining both the differences and the similarities between the rights granted to citizens and to illegal aliens during Reconstruction.

In Part II, we turn to a discussion of the original public meaning of the text of both the Civil Rights Act of 1866 and of the Fourteenth Amendment to show why the 1975 Texas statute discriminating against children who were illegal aliens was unconstitutional. We show how noncitizens were in fact given Fourteenth Amendment protections in the text of the Amendment and why the children of illegal aliens have a right to a public-school education today. To analyze the text in an originalist fashion, we make heavy use of dictionaries that would have been available to the American general public in the 1860s. Our argument rests on the textual analysis, but in Part III we provide context, by explaining the history of the act and amendment, for the word choices of the framers of the Fourteenth Amendment.

403 U.S. at 152–53. From 1938 to 1969, the Supreme Court found a rational basis for every law it considered except for laws in three categories, which footnote four of *Carolene Products* held were entitled to heightened scrutiny: (1) state laws that violated a right listed in the U.S. Bill of Rights; (2) laws closing off the political channels of change, such as incumbent protection measures; and (3) laws discriminating against religious, racial, linguistic or other discrete and insular minorities. *Id.* at 152 n.4.

Finally, Part IV addresses other cases in which the Supreme Court has struck down state laws that discriminated against aliens²³ and how our originalist analysis supports those decisions. We do not address more recent concerns about federalism as applied to illegal alienage in this Article because that debate raises distinct issues that rely primarily on the text of the Constitution itself and not its amendments. This Article focuses only on the Fourteenth Amendment and state action discriminating against aliens.

II. THE ORIGINAL PUBLIC MEANING OF THE TEXTS: RIGHTS AFFORDED TO ALIENS

Scalia-style originalism revolves around the importance of a law's historical origins and the original public meaning of the law's text at the time of enactment. A lawmaker's *intent* is not necessarily indicative of what the words of a law actually *meant* to the American people when the law was adopted. As Professor Calabresi and Andrea Matthews explain, suppose Congress passed a law decreeing that the colors of the American flag should be red, white, and blue, but members of Congress believed, and intended, that the word "blue" actually meant the color "green." The flag would still be red, white, and blue, contrary to congressional intent, because the American public would have understood the word "blue" to mean the color "blue" and not the color "green."²⁴ The *original public meaning* of the law—the public meaning of the text when it was enacted—is controlling for originalists.

The difference between original intent and original public meaning is foundational to the argument that *Plyler v. Doe* conforms to the original meaning of the Fourteen Amendment. Explaining how his theory differs from that of original intent, Justice Scalia commented,

The theory of originalism treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated. You will sometimes hear it described as the theory of original intent. You will never hear me refer to original intent, because as I say I am first of all a textualist, and secondly an originalist. If you are a textualist, you don't care about the intent,

23. See *supra* note 10 for a list of the specific cases.

24. Calabresi & Matthews, *supra* note 14, at 1397.

and I don't care if the framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.²⁵

Justice Scalia, after searching for general decision-making rules, offered “his Golden Rule for decision making”:

The words are the law. I think that's what is meant by a government of laws, not of men. We are bound not by the intent of our legislators, but by the laws which they enacted, which are set forth in words, of course. As I say, until recently this was constitutional orthodoxy. Everyone at least said . . . that the Constitution was that anchor, that rock, that unchanging institution that forms the American polity. Immutability was regarded as its characteristic. What it meant when it was adopted it means today, and its meaning doesn't change just because we think that meaning is no longer adequate to our times.²⁶

The rationale underlying Scalia's theory is, quite simply, that lawmaking in a constitutional democracy like ours is a public act. Citizens cannot participate in the democratic process or lobby their elected representatives if proposed legal texts have secret or private meanings that are unknown to the general public. Members of Congress cannot know when to propose amendments to a law, and the President cannot know whether to sign or veto a law, if the law has a secret meaning that can be discerned only by looking at what one or a few lawmakers “intended.” It is hard enough to figure out what one individual may have intended in, say, a criminal case; figuring out what groups of people—like the Reconstruction Congress—intended is hopeless. We can determine what the words of the Fourteenth Amendment meant in 1868 and, in a general way, what problem it was meant to correct, but there is no coherent method to determine what the framers and ratifiers of that Amendment intended.

The best indicia of the original public meaning of the words of the Fourteenth Amendment are found in the dictionaries and grammar books that were widely used at the time the amendment was ratified.²⁷ Newspaper editorials from that time period may also be used to

25. BRUCE ALLEN MURPHY, *SCALIA: A COURT OF ONE* 246 (2014).

26. *Id.*

27. Calabresi & Matthews, *supra* note 14, at 1396.

recover the objective “original public meaning of a newly enacted legal text” and to understand some of the public events that caused Congress to propose the Fourteenth Amendment.²⁸ It is important, however, to keep in mind that newspaper editorials are, in part, public *interpretations* of the text of the Fourteenth Amendment. They can be beneficial, but it is important when analyzing the Amendment to start with the dictionary definitions of the words that the Amendment uses. Dictionary definitions express the social meaning of a word; newspaper editorials may perform a similar task, but they may also be biased. Conversely, congressional legislative history is notoriously unreliable because members of Congress have powerful incentives to overstate or understate what the text of a particular proposed act means.

We begin here by analyzing the text of Section 1 of the Fourteenth Amendment using Noah Webster’s authoritative *American Dictionary of the English Language*. Webster published the first edition of his dictionary in 1828, after taking nearly twenty years to finish it.²⁹ The volume contained 70,000 words and included 40,000 more definitions than had ever before been published in an English dictionary.³⁰ The edition we use to deduce the Fourteenth Amendment’s original public meaning is one published in 1848—five years after Webster’s death in 1843—by Chauncey A. Goodrich, a professor at Yale University, who changed the dictionary only slightly, in accordance with Webster’s own plans: “[T]o present, on a reduced scale, a clear, accurate, and full exhibition of the American Dictionary in all its parts,” to “[make] it a Synonymous Dictionary,” and to update the definitions surrounding words relating to art and science.³¹

28. *Id.*

29. Joshua Lawrence Eason, *Dictionary-Making in the English Language*, 5 PEABODY J. EDUC., 347, 352 (1928).

30. *Id.*

31. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, at iii (Chauncey A. Goodrich ed., 1848). Goodrich writes in his preface:

The plan of this abridgement, as made under the author’s direction in 1829, by Joseph E. Worcester, Esq., of Cambridge, Mass., is thus stated in the original preface: ‘The leading and most *etymologies*, as given in the quarto edition, are here retained. The *definitions* remain unaltered, except by an occasional compression in their statement. All the significations of words as exhibited in the larger work are here retained, but the illustrations and authorities are generally omitted. In doubtful or contested cases, however, they are carefully retained.’ In accordance with this plan, Dr. Webster directed the additions and alterations of the larger work, in the edition

It may seem that, due to the Civil War and the immense amount of upheaval it brought to the country, definitions would have changed between 1848 and 1866, when the Civil Rights Act of 1866 was passed and the process of drafting the Fourteenth Amendment began.³² This claim, however, is unfounded—three different versions of Webster’s dictionary—1828, 1848, and 1867—all define the word “person,”³³ a critical word in the Fourteenth Amendment, in the same way, indicating continuity in definitions between 1848 and 1866.³⁴

of 1840, to be inserted in this abridgment. This was done at the time, as far as possible, by means of an appendix; and is now more perfectly accomplished by carrying all the improvements then made into their proper places in the body of the work. The subsequent improvements of the larger work, down to the period of the author’s death, have also been introduced, in substance, to this edition, under the heads to which they belong. The present revision has been extended equally to both the works, and the results have been embodied in each, on the principles stated above, in their due proportion. By these successive revisions a very great amount of valuable matter has been added to this abridgement. It is *now* made, in all important respects, consistent with the larger work, and is designed to present, on a reduced scale, a clear, accurate, and full exhibition of the American Dictionary in all its parts.

One new feature is now added to this volume, by making it a Synonymous Dictionary. . . . Under each of the important words, all others having the same general signification are arranged together, except in cases where they have been previously exhausted in framing the definitions. This arrangement, it is hoped, will be found of frequent use even to those practiced in composition; while it will afford important aid to young writers in attaining grace, variety, and copiousness of diction.

The chief value of a dictionary consists in its *definitions*,—in giving a clear, full, and accurate exhibition of all the various shades of meaning which belong, by established usage, to the words of a language. It is in this respect especially, that Dr. Webster’s Dictionary has been generally considered superior to every other, both of this country and of England. To this point, therefore, the labors of the editor have been mainly directed. No efforts have been spared to obtain the most recent and valuable works, not only in lexicography, but in the various departments of art and science embraced in the American Dictionary. As these subjects are in a state of continual progress, every important word, in its various applications, has been diligently examined and compared with the statements made on each topic by the latest and most approved authorities.

Id.

32. Calabresi & Matthews, *supra* note 14, at 1425.

33. We chose to compare the word “person” because it is the word most crucial to our originalist analysis of the Fourteenth Amendment. We believe that the framers’ choice to use the word “person,” as opposed to “citizen” or some other specific word, extends the rights afforded under the Equal Protection Clause to noncitizens as well as citizens, because both are people.

34. Webster’s 1828 edition of his dictionary supplies the following definition, in part, for “person”:

1. An individual human being consisting of body and soul. We apply the word to *living* beings only, possessed of a rational nature; the body when dead is not called

The full text of Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.³⁵

A. Citizenship and the Privileges & Immunities Clause

The first clause, known as the Citizenship Clause, applies only to citizens of the United States and can in no way be construed to apply to aliens. We know this because Webster defines the word “citizen” in the following manner:

a *person*. It is applied alike to a man, woman or child. . . . 2. A man, woman or child, considered as opposed to things, or distinct from them. . . . 3. A human being, considered with respect to the living body or corporeal existence only. . . . 4. A human being, indefinitely; one; a man. . . . 5. A human being represented in dialogue, fiction, or on the stage; character.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) [hereinafter WEBSTER, 1828 DICTIONARY]. Webster’s 1848 version gives a nearly word-for-word replication of the 1828 definition:

1. An individual human being, consisting of body and soul. 2. A man, woman, or child, considered as opposed to things, or distinct from them. 3. A human being, considered with respect to the living body or corporeal existence only. 4. A human being, indefinitely; one; an individual; a man. 5. A human being represented in dialogue, fiction, or on the stage; character.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, 734 (Chauncey A. Goodrich ed., 1848) [hereinafter WEBSTER, 1848 DICTIONARY]. And, finally, the definition provided in Webster’s 1867 version, which is also remarkably similar, states:

1. An individual human being, consisting of body and soul. 2. A man, woman, or child, considered as opposed to things, or distinct from them. 3. A human being, considered with respect to the living body or corporeal existence only. 4. A human being, *indefinitely*; one; an individual; a man. 5. A human being represented in dialogue, fiction, or on the stage; character.

NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 734 (Chauncey A. Goodrich ed., 1867). The word “person” was not the only word examined—all words defined using the 1848 edition of Webster’s dictionary were looked up in the 1828 and 1867 versions of the dictionary. For the words defined in this article, there is little, if any, change between the three different versions of each word. Oftentimes, a definition is expanded upon as time goes on, but the meaning of the word defined remains unchanged.

35. U.S. CONST. amend. XIV, § 1.

1. A native of a city, or an inhabitant who enjoys the freedom and privileges of the city in which he resides. 2. A townsman; a man of trade; not a gentleman. 3. An inhabitant; a dweller in any city, town, or place. 4. In a *general sense*, a native or permanent resident in a city or country. 5. In the *United States*, a person, native or naturalized, who has the privileges of exercising the elective franchise, and of purchasing and holding real estate.³⁶

One might point out that definitions two and three could be used to describe aliens; however, definitions one, four, and five clearly indicate that Webster, and, as such, the American public as a whole, would have understood the word “citizen” in 1868 to apply only to an individual born in (or naturalized by) the United States. People continue to understand the word that way even today. There is a key difference between the word “citizen” and the word “inhabitant,” which Webster uses both in his first and third definitions of the word “citizen.” Webster defines an “inhabitant” as

1. A dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. 2. One who has a legal settlement in a town, city, or parish.³⁷

36. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 177. The definition of “citizen” as given by Webster’s 1828 dictionary is:

1. The native of a city, or an inhabitant who enjoys the freedom and privileges of the city in which he resides; the freeman of a city, as distinguished from a foreigner, or one not entitled to its franchises. 2. A townsman; a man of trade; not a gentleman. 3. An inhabitant; a dweller in any place. 4. In a *general sense*, a native or permanent resident in a city or country; as in the *citizens* of London or Philadelphia; the *citizens* of the United States. 5. In *the U. States*, a person, native, or naturalized, who has the privilege of exercising the elective franchise, or the qualifications which enable him to vote for rulers, and to purchase and hold real estate.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

37. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 542. The 1828 Webster definition is: A dweller; one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor; as the *inhabitant* of a house or cottage; the *inhabitants* of a town, city, county or state. So brute animals are *inhabitants* of the regions to which their natures are adapted; and we speak of spiritual beings, as *inhabitants* of heaven. 2. One who has a legal settlement in a town, city or parish. The conditions or qualifications which constitute a person an inhabitant of a town or parish, so as to subject the town or parish to support him, if a pauper, are defined by the statutes of different governments or states.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

The word “inhabitant” thus denotes the physical action of living somewhere on a permanent basis, but it did not apply only to citizens in 1868. Travelers on a lengthy, yearlong vacation in the United States are denizens, or inhabitants of the United States, even though they are not citizens. Article IV of the Articles of Confederation made “all of the free inhabitants” of the United States citizens—“paupers, vagabonds and fugitives from justice excepted.”³⁸ It is for this reason that in five of the original thirteen states, free African Americans were citizens and could vote. The generous language of the Articles of Confederation about extending citizenship to all free inhabitants was dropped in the Constitution, which gave Congress the power to pass naturalization laws.

A citizen is usually an inhabitant of his or her nation, although some U.S. citizens may and do live abroad for a period of time. Thus, “inhabitants” of the United States may also be U.S. citizens, but only if they were born in the United States or naturalized by the U.S. government. Inhabitants of the United States may well be foreigners and noncitizens. Had the Fourteenth Amendment used the word “inhabitant,” in place of the word “citizen,” Section 1 could have included aliens in the Citizenship Clause and the Privileges or Immunities Clause.³⁹ Instead, the Privileges or Immunities Clause says, “No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States.”⁴⁰ Thus, it is clear that aliens have no protection under either the Citizenship Clause or the Privileges or Immunities Clause of the Fourteenth Amendment. The “privileges or immunities” granted to native-born or naturalized Americans simply do not apply to aliens. In fact, Webster himself drives this point home, defining the word *alien* as

38. ARTICLES OF CONFEDERATION OF 1781, art. IV.

39. For further discussion of this idea, see *infra* Part II. The Articles of Confederation, in fact, used the word “inhabitants” in its prototypical Privileges and Immunities Clause, which most probably was intended to include noncitizens living in the states at the time of its framing and ratification. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1. The Clause reads in part:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free *inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States

Id. (emphasis added).

40. U.S. CONST. amend. XIV, § 1 (emphasis added).

“[a] foreigner; one born in, or belonging to, another country; one who is not entitled to the privileges of a citizen.”⁴¹ As such, the Privileges or Immunities Clause cannot be used to defend the children of illegal aliens in *Plyler v. Doe*.

B. Due Process and Equal Protection for “[A]ny [P]erson”

The second sentence of Section 1, however, contains two clauses that protect all “persons” and are thus relevant to aliens or noncitizens. Both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment clearly apply to all persons, and thus the cornerstone of our argument throughout this Article will be that those clauses confer upon alien children the right to a public-school education recognized in *Plyler v. Doe*. This text provides that “No State shall . . . deprive *any* person of life, liberty, or property, without due process of law; nor deny to *any* person within its jurisdiction the equal protection of the laws.”⁴² Webster’s dictionary defines the word “any,” which appears in both the Due Process Clause and the Equal Protection Clause as “1. One, indefinitely. 2. Some; an indefinite number, plurally. 3. Some; an indefinite quantity; a small portion. 4. It is often used as a substitute, the person or thing being understood. It is used in opposition to *none*.”⁴³

As Webster’s definitions illustrate, the word “any” in the Due Process and Equal Protection Clauses indicates a degree of indefiniteness. Likewise, “anything” is a modern-day compound word that, defined loosely, means “a wide range of things” (e.g., “Billy loved his dog more than *anything* in the world”); “anywhere” refers to some sort of unspecified location (e.g., “Bored to tears, Lisa wanted

41. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 28. Webster’s 1828 dictionary provides the following definition: “[a] foreigner; one born in, or belonging to, another country; one who is not a denizen, or entitled to the privileges of a citizen.” WEBSTER, 1828 DICTIONARY, *supra* note 34.

42. U.S. CONST. amend. XIV, § 1 (emphasis added).

43. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 48. The definition in 1828, as provided by Webster’s dictionary, was:

1. One indefinitely. . . . 2. Some; an indefinite number, plurally; for though the word is formed from *one*, it often refers to *many*. Are there *any* witnesses present? The sense seems to be a small, uncertain number. 3 Some; an indefinite quantity; a small portion. . . . 4. It is often used as a substitute, the person or thing being understood. . . . It is used in opposition to *none*.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

to be *anywhere* but her cubicle”).⁴⁴ When the Due Process and Equal Protection Clauses use the word “any” to modify the word “person,” it has that same indefinite connotation. States may not deprive just one type of person life, liberty, and property, nor may they deny just one type of person the equal protection of the laws. The Due Process and Equal Protection Clauses apply to *every single type* of person—*any* person—as opposed to only certain types of people. Illegal aliens and their children fall under the broad category of “every single type of person,” and as such states must give them the protections of the Due Process and Equal Protection Clauses.

The key distinction between the Citizenship and Privileges or Immunities Clauses and the Due Process and Equal Protection Clauses is that the latter two Clauses use the word *person* rather than *citizen*. Webster defines the word “person” in the following (painstakingly detailed) manner:

1. An individual human being, consisting of body and soul. 2. A man, woman, or child, considered as opposed to things, or distinct from them. 3. A human being, considered with respect to the living body or corporeal existence only. 4. A human being, *indefinitely*; one; an individual; a man. 5. A human being represented in dialogue, fiction, or on the stage; character. 6. Character of office.—7. *Formerly*, the parson or minister of a parish.—8. In *grammar*, the subject of a verb; the agent that performs, or the patient that suffers, any thing affirmed by a verb; as, *I, thou, he*. Also, that modification of the verb which is used in connection with the subject.—9. In *law*, an *artificial person* is a corporation or body politic.—*In person*, by one’s self; with bodily presence; not by representative.⁴⁵

44. The *New Oxford American Dictionary* gives the following definition for “anything”:

[usu. with *negative* or in *questions*] used to refer to a thing, no matter what: *nobody was saying anything | have you found anything? | he inquired whether there was anything he could do.* • [without *negative*] used for emphasis: *I was ready for anything.* • used to indicate a range: *he trains anything from seven to eight hours a day.*

NEW OXFORD AMERICAN DICTIONARY 71 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010). The same dictionary gives the following for “anywhere”:

[usu. with *negative* or in *questions*] in or to any place: *he couldn’t be found anywhere. . . .* [without *negative*] used for emphasis: *I could go anywhere in the world. . . .* used to indicate a range: *this iron garden seat dates anywhere from 1890 to 1920 | she could have been anywhere between twenty-five and forty.*

Id.

45. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 734. See *supra* note 34 for definitions of the word in both 1828 and 1864 according to Webster’s dictionaries published in those years.

Aliens resident in the United States are not citizens, but they are without question persons under Webster's definition of the word *person*, which includes: (1) "individual human beings," (2) "man, woman, or child," and (3) "human being[s], considered with respect to the living body."⁴⁶ Since aliens, legal or illegal, qualify as people under Webster's 1848 definition, the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment clearly apply to aliens and applied to them in 1868 when the Fourteenth Amendment was ratified.

C. The Original Meaning of the Due Process Clause

Now that we know that the Due Process and Equal Protection Clauses of Section 1 of the Fourteenth Amendment apply to aliens, we must parse the text of those Clauses to fully understand their significance. The Due Process Clause says that no state shall "deprive any person of life, liberty, or property, without due process of law."⁴⁷ Let's begin by looking at the original public meaning of the words of this Clause both in a general sense and more specifically in the context of *Plyler v. Doe*. The first important word here is "deprive," which Webster defines as follows:

1. To take from; to take away something possessed or enjoyed; as, to *deprive* of one's rights. 2. To hinder from possessing or enjoying; as, "*deprived* of his blessed countenance."—*Milton*. 3. To free or release from; [*obs.*] 4. To divest of an ecclesiastical preferment, dignity, or office; to divest of orders.—*Syn.* To strip; bereave; rob; despoil; debar; abridge; divest.⁴⁸

This part of the Due Process Clause makes clear that a state may not take something away from *any person*.

46. *Id.*

47. U.S. CONST. amend XIV, § 1.

48. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 282. In 1828, Webster defined the word as meaning:

1. To take from; to bereave of something possessed or enjoyed; followed by *of*; as, to *deprive* a man *of* sight; to *deprive* one *of* strength, of reason, or of property. 2. To hinder from possessing or enjoying; to debar. . . . [*This use of the word is not legitimate, but common.*] 3. To free or release from. 4. To divest of an ecclesiastical preferment, dignity, or office; to divest of orders; as a bishop, prebend or vicar.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

Next, we need to define exactly what the states may not deprive any person of. The first item mentioned by the Due Process Clause is “life.” Webster’s dictionary defines “life” as follows:

1. In a general *sense*, that state of animals and plants, or of an organized being, in which its natural functions and motions are or may be performed.—2. In *animals*, animation; vitality; and in *man*, that state of being in which the soul and body are united. . . . 4. The present state of existence; the time from birth to death. 5. Manner of living; conduct; deportment in regard to morals; as, an honest *life*. 6. Condition; course of living, in regard to happiness and misery.⁴⁹

Thus, in the Fourteenth Amendment sense of the word, “life” can refer to both the state of being alive and a person’s “manner of living.”

And, just as the Due Process Clause says that a state cannot deprive a person of his or her “life,” a state also cannot deprive a person of his or her “liberty.” Webster defines “liberty” as meaning:

1. Freedom from restraint, in a *general sense*, and applicable to the body, or to the will or mind.—2. *Natural liberty* consists in the power of acting as one thinks fit, without any restraint or control, except from the laws of nature.—3. *Civil liberty* is the liberty of men in a state of society, or natural liberty, so far only abridged and restrained as is necessary and expedient for the safety and interest of the society, state, or nation. . . . 7. Privilege; exemption; immunity enjoyed by prescription or by grant: with a plural. 8. Leave; license; permission granted. . . . 10. Freedom of action or speech beyond the ordinary bounds of civility or decorum.—*To take the liberty* to do or

49. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 595. The 1828 version of Webster’s dictionary supplies the following definition, in part:

1. In a *general sense*, that state of animals and plants, or of an organized being, in which its natural functions and motions are performed, or in which its organs are capable of performing their functions. A tree is not destitute of life in winter, when the functions of its organs are suspended; nor man during a swoon or syncope; nor strictly birds, quadrupeds or serpents during their torpitude in winter. They are not strictly dead, till the functions of their organs are incapable of being renewed. 2. In *animals*, animation; vitality; and in *man*, that state of being in which the soul and body are united. . . . 4. The present state of existence; the time from birth to death. The *life* of man seldom exceeds seventy years. 5. Manner of living; conduct; deportment, in regard to morals. 6. Condition; course of living, in regard to happiness and misery. We say, a man’s *life* has been a series of prosperity, or misfortune. . . . 10. Spirit; animation; briskness; vivacity; resolution. . . . 13. General state of man, or of social manners; as the studies and arts that polish *life*. 14. Condition; rank in society; as high *life* and low *life*.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

say any thing, to use freedom not specially granted.—*To set at liberty*, to deliver from confinement; to release from restraint.—*To be at liberty*, to be free from restraint.⁵⁰

For our purposes, we can condense this definition down to freedom from restraint, freedom to have control over one's own being, and freedom to think for oneself.

Along with the abstract concepts of life and liberty, the Due Process Clause says that no state may deprive any person of "property," a word that carries a more concrete meaning. Webster defines "property" in the following manner:

1. A peculiar quality or attribute of any thing; that which is inherent in a subject, or naturally essential to it. 2. An acquired or artificial quality; that which is given by art or bestowed by man. 3. Quality; disposition. 4. The exclusive right of possessing, enjoying, and disposing of a thing; ownership. 5. Possession held in ones' own right.—*Dryden*. 6. The thing owned; that to which a person has the legal title, whether in his possession or not. 7. An estate, whether in lands, goods, or money. 8. An estate; a farm; a plantation. . . .⁵¹

50. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 594. The definition was remarkably similar in Webster's 1828 dictionary:

1. Freedom from restraint, in a general sense, and applicable to the body, or to the will or mind. The body is at *liberty*, when not confined; the will or mind is at *liberty*, when not checked or controlled. A man enjoys *liberty*, when no physical force operates to restrain his actions or volitions. 2. *Natural liberty*, consists in the power of acting as one thinks fit, without any restraint or control, except from the laws of nature. It is a state of exemption from the control of others, and from positive laws and the institutions of social life. This liberty is abridged by the establishment of government. 3. *Civil liberty*, is the liberty of men in a state of society, or natural liberty, so far only abridged and restrained, as is necessary and expedient for the safety and interest of the society, state or nation. A restraint of natural liberty, not necessary or expedient, is tyranny or oppression. Civil liberty is an exemption from the arbitrary will of others, which exemption is secured by established laws, which restrain every man from injuring or controlling another. Hence the restraints of law are essential to *civil liberty*.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

51. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 787. In 1828, according to Webster's dictionary, "property" meant:

1. A peculiar quality of any thing; that which is inherent in a subject, or naturally essential to it; called by logicians an *essential mode*. Thus color is a *property* of light; extension and figure are *properties* of bodies. 2. An acquired or artificial quality; that which is given by art or bestowed by man. The poem has the *properties* which constitute excellence. 3. Quality; disposition. . . . 4. The exclusive right of possessing, enjoying and disposing of a thing; ownership. . . . 5. Possession held in one's own

Using this definition, we see that “property” meant one’s possessions or belongings. As such, under the Fourteenth Amendment, the states could not unlawfully divest *any person* of his or her possessions or estate. The framers of the Fourteenth Amendment had all of these definitions available to them when they ratified the Due Process Clause in 1868; therefore, the language discussed so far says that no state can take away any person’s life (in both the sense of being alive and one’s “manner of living”), freedom (from restraint, to act under one’s own power, of speech, and of religion), or belongings (be they land or other objects), except after giving that person “due process of law.”

While we have examined the text of the Due Process Clause up until “due process of law” to understand the words’ original meaning in the 1800s, we will not be applying this same analysis to that phrase. In 1868, The Due Process Clause of the Fourteenth Amendment would have been thought to embody a legal term of art because it imitates the Due Process Clause of the Fifth Amendment in the federal Bill of Rights.⁵² In 1868, many state constitutions also included due process clauses,⁵³ and these clauses all descended from a clause in Magna Carta, which said,

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against

right. . . . 6. The thing owned; that to which a person has the legal title, whether in his possession or not. It is one of the greatest blessings of civil society that the *property* of citizens is well secured. 7. An estate, whether in lands, goods or money; as a man of large *property* or small *property*.

WEBSTER, 1828 DICTIONARY, *supra* note 34.

52. The language of the amendment reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

53. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 65–67 (2008).

him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.⁵⁴

Many state bill of rights in 1868 used Magna Carta-esque language to forbid depriving any person of “life, liberty, or estate but by the judgment of his peers or the law of the land.”⁵⁵ This formulation was thought to be identical in meaning to the federal formulation that forbade any state from depriving any person of life, liberty, or property without due process of law.⁵⁶ Deprivations made by state or federal law were presumptively constitutional.⁵⁷ The Fifth

54. MAGNA CARTA, ch. 39 (1215), *reprinted in* MAGNA CARTA: LAW, LIBERTY, LEGACY 267 (Claire Brey & Julian Harrison eds., 2015).

55. Calabresi & Agudo, *supra* note 53, at 66.

56. Steven G. Calabresi, Sarah E. Agudo & Katheryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012).

57. Justice Hugo Black explains the philosophy that it is constitutional for lawmakers to make deprivations in his dissent in the landmark 1965 case *Griswold v. Connecticut*:

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court’s belief that a particular state law under scrutiny has no “rational or justifying” purpose, or is offensive to a “sense of fairness and justice.” If these formulas based on “natural justice,” or others which mean the same thing, are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. *I readily admit that no legislative body, state or national, should pass laws that can justly be given any of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose.* While I completely subscribe to the holding of *Marbury v. Madison*, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, *I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of “civilized standards of conduct.”* Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom, and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.

Amendment's Due Process Clause was addressed to arbitrary or capricious *executive or judicial actions* and not to arbitrary and capricious *statutes*, as the original Magna Carta clause was written to protect against arbitrary and capricious actions by the king's sheriffs, not lawmakers. It guaranteed *procedural* due process, as the Supreme Court suggested in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁵⁸ and not *substantive* due process as the Supreme Court wrongly

381 U.S. 479, 511–14 (1965) (emphasis added) (footnotes and citation omitted).

58. See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856). The case hinged around whether the federal government was in violation of the Fifth Amendment's Due Process Clause when it tried to reclaim funds that had been embezzled from it. *Id.* at 275. The Court concluded that the federal government's actions were constitutional, *id.* at 285–86, and the opinion is famous for its discussion of the meaning behind the Fifth Amendment's Due Process Clause. Justice Curtis explained the philosophy behind the phrase “due process of law,” as first suggested in the Magna Carta, in the following excerpt from the majority opinion of the case:

The words, “due process of law,” were undoubtedly intended to convey the same meaning as the words, “by the law of the land,” in *Magna Charta*. Lord Coke, in his commentary on those words, says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, “but by the judgment of his peers, or the law of the land.” . . .

The constitution of the United States, as adopted, contained the provision, that “the trial of all crimes, except in cases of impeachment, shall be by jury.” When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, “law of the land,” without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, “law of the land,” in that instrument, and which were undoubtedly then received as their true meaning.

Id. at 276 (citation omitted). He later says the following:

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the constitution some other provision which restrains congress from authorizing such proceedings. For, though “due process of law” generally implies and includes *actor, reus, iudex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet, this is not universally true. There may be,

suggested in *Dred Scott v. Sandford*⁵⁹ and *Lochner v. New York*.⁶⁰ It was widely understood that a major objective of the Fourteenth Amendment's Due Process Clause was the complete overturning and uprooting of *Dred Scott v. Sandford*, ensuring that no state could take away someone's life, freedom, or possessions and guaranteeing, as a legal term of art, procedural due process for all persons.⁶¹

D. The Original Meaning of the Equal Protection Clause

Our understanding of the Equal Protection Clause may also be informed by original dictionary meanings. This is even more the case because whereas the Due Process Clause is a legal term of art, the Equal Protection Clause is not and thus requires a word-by-word analysis of its original dictionary meaning. The Equal Protection Clause says that the states shall not “deny to any person within [their] jurisdiction the equal protection of the laws.”⁶² The word “deny” is defined as follows:

1. To declare a statement or position not to be true. 2. To refuse to grant; as, to *deny* a request. 3. Not to afford; to withhold; as, to *deny* aid. 4. To disown; to refuse or neglect to acknowledge; not to confess; as, to *deny* one's master. 5. To reject; to disown; not to receive or embrace. 6. Not to afford or yield.—*To deny one's self*, is to decline the gratification of appetites or desires; to refrain from; to abstain.—Syn. To contradict; gainsay; disallow; disavow; disclaim; renounce; abjure.⁶³

and we have seen that there are cases, under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the constitution which relate to the judicial power are incompatible with these proceedings?

Id. at 280 (citation omitted).

59. 60 U.S. 393 (1856).

60. 198 U.S. 45 (1905).

61. See discussion of *Dred Scott v. Sandford* and the Due Process Clause in PAUL BREST, ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 250–51 (5th ed. 2006).

62. U.S. CONST. amend. XIV, § 1.

63. WEBSTER, 1848 DICTIONARY, *supra* note 34. Webster's 1828 dictionary defines the word in the following manner:

1. To contradict; to gainsay; to declare a statement or position not to be true. We *deny* what another says, or we *deny* a proposition. We *deny* the truth of an assertion, or the assertion itself. The sense of this verb is often expressed by *no* or *nay*.

“Deny” clearly meant the same thing in 1848 as it does today: to deprive of, to withhold from, or to disavow.⁶⁴ If the states were forbidden from denying to any persons within their jurisdiction the equal protection of the laws, the double negative of “forbidden from denying” means that they *had to provide* equal protection of the laws to any persons within their jurisdiction.

But what did the framers of the Fourteenth Amendment mean by “jurisdiction”? This word is significant because the Equal Protection Clause only applies to persons within a state’s jurisdiction. Webster defines “jurisdiction” as

1. The legal power or authority of doing justice in cases of complaint; the power of executing the laws and distributing justice.
2. Power of governing or legislating. 3. The power or right of exercising authority. 4. The limit within which power may be exercised.⁶⁵

This definition indicates that the Equal Protection Clause applies to *any person* over whom a State may exercise governance: at the time of this Clause’s creation in the 1860s, the only persons within a state not considered “within its jurisdiction” would have been Native Americans.⁶⁶ Immigrants are not Native Americans, so using the

2. To refuse to grant; as, we asked for bread, and the man *denied* us. 3. Not to afford; to withhold. . . . 4. To disown; to refuse or neglect to acknowledge; not to confess.
5. To reject; to disown; not to receive or embrace. . . . 6. Not to afford or yield.

WEBSTER, 1828 DICTIONARY, *supra* note 34. We have provided readers with select 1828 definitions alongside the 1848 definitions to further support our assertion that dictionary definitions were not rapidly changing during the period of the Framing and ratifying of the Fourteenth Amendment. We checked the 1828 and 1867 definitions for each word defined in this Article, and none had significantly changed.

64. From the modern-day *Merriam-Webster’s Collegiate Dictionary*, which gives the following definition for “deny”:

- 1: to declare untrue <~an allegation> 2: to refuse to admit or acknowledge : disavow <~responsibility> 3a: to give a negative answer to <~ing the petitioners> b: to refuse to grant <~ a request> c: to restrain (oneself) from gratification of desires 4 archaic: decline 5: to refuse to accept the existence, truth, or validity of

MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 334 (11th ed. 2003).

65. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 571.

66. For an in-depth discussion of federal and state jurisdiction as applied to Native American tribes and tribal land, see our own discussion on this topic, *infra* Section III.C, in which we relied heavily upon Gerald Neuman’s excellent coverage of the issue. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION 171–72 (1996). Note that Donald Trump has argued erroneously that children born to alien parents in the United States are not “subject to the jurisdiction” of the United States and are thus not citizens. This construction was rejected

original public meaning of the word “jurisdiction” in the 1860s, immigrants fell “within the jurisdiction” of the state in which they resided. As a result, the Equal Protection Clause’s language strongly suggests that a state must provide any non-Native American person under its governance—including immigrants and the children of illegal aliens—with the “equal protection of the laws.”

We turn now to the core question of what the Equal Protection Clause itself means. Webster defines the adjectival form of “equal” as meaning:

1. Having the same magnitude or dimensions; being of the same bulk or extent. 2. Having the same value. 3. Having the same qualities or condition; as of *equal* density. 4. Having the same degree; as of rapidity. 5. Even; uniform; not variable; as temper. 6. Being in just proportion. 7. Impartial; neutral; not biased. 8. Indifferent; of the same interest or concern. 9. Just; equitable; giving the same or similar rights or advantages. 10. Being on the same terms; enjoying the same or similar benefits. 11. Adequate; having competent power, ability, or means.—Syn. Even; equable; uniform; adequate; proportionate; commensurate; fair; just; equitable.⁶⁷

It is difficult to synthesize these definitions, but they suggest that “equal” is a comparative word signifying that two or more things are the same. When used in the Fourteenth Amendment, the word “equal” and its connotations can be taken to mean that the protection of the laws applies *in the same fashion* to any person within a state’s jurisdiction.

The next and most critical question is: what did the word “protection” mean in 1868? Webster defines the word “protection” as

1. The act of protecting or preserving from evil, loss, injury, or annoyance. 2. That which protects or preserves from injury. 3. A writing that protects; a passport or other writing which secures from molestation. 4. Exemption, as from molestation or arrest.—Syn. Preservation; defense; guard; shelter; refuge; security; safety.⁶⁸

by the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). It is also contrary to Section 2 of the Fourteenth Amendment, which counts as persons, for purposes of allocating seats in the House of Representatives and in the Electoral College, all persons inhabiting a state except for “Indians not taxed.” U.S. CONST. amend. XIV, § 2.

67. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 363.

68. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 790.

With these definitions in place, we see that the original public meaning of the Equal Protection Clause was to provide that no state may, within its boundaries, “refuse to grant” to one person the same defense, shelter, safety, security, or refuge of the law that another person receives.

Therefore, generally, the Equal Protection Clause of Section 1 of the Fourteenth Amendment bars all states from unlawfully taking away the life, freedom, or belongings of any person, including both illegal and legal aliens. All persons are owed the same defense, safety, security, shelter, or refuge under the law as all other persons receive. The noun in the Equal Protection Clause is “protection,” while “equal” is merely an adjective. The Equal Protection Clause is fundamentally about securing the protection, or shelter, of the laws.

E. Original Meaning and Public Education for Illegal Aliens

But what does all of this mean for the children of illegal aliens seeking to attend public schools in *Plyler v. Doe*? We already know that both the Due Process and the Equal Protection Clauses apply to children who are illegal aliens because those children fall within the category of “any person” under Webster’s definitions of those two words. Yet, the Due Process Clause cannot plausibly be used to defend the right to a public-school education of children who are illegal immigrants. The ability to attend public school is not “life, liberty, or property”—as those terms are used by Webster—and Texas did not violate the Due Process Clause when it passed a state statute barring children who are illegal aliens from attending public schools. Under the Due Process Clause’s original meaning, Texas is perfectly free to deprive persons of life, liberty, or property so long as it does so by judgment of their peers or by a statute, which is the law of the land.

The Texas law *is* unconstitutional, however, under the Equal Protection Clause. The Equal Protection Clause applies to “any person” (citizen or noncitizen, adult or child) within the jurisdiction of a state. Illegal immigrant children who are in Texas are plainly within the jurisdiction of the state of Texas; since the federal government has nationalized immigration laws, only national officials and *not* state officials have the power to expel the children from the country. The 1975 Texas statute barring the children of illegal noncitizens from attending Texas’s public school system violated the Equal Protection Clause because it gave less protection—shelter or

refuge under the law—to illegal alien children than it gave to other children in the state of Texas.

The Texas law was created precisely to single out the children of illegal immigrants and deny them the equal protection of the laws, withholding access to the public-school system in Texas. There was no equivalent law providing an education for the children of illegal aliens that Texas could claim was “equal” to its general-public-schools law. As such, there was simply no way Texas could claim it was complying with the original public meaning of the Equal Protection Clause.⁶⁹

Although original public meaning analysis relies primarily, and almost exclusively, on a textual reading of the Fourteenth Amendment, the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment also shows that many Reconstruction founders would have agreed that the Equal Protection Clause supports the holding in *Plyler v. Doe*. The legislative history should be discounted by judges as largely irrelevant to the textual analysis, but it provides additional support for our original public meaning textualism.

III. THE HISTORY OF THE ACT AND THE AMENDMENT: CITIZENSHIP VERSUS ALIENAGE

A. Legislative History Behind the Fourteenth Amendment

1. Civil rights, “inhabitants,” and the origins of the equal protection doctrine

In 1865, the Thirty-ninth Congress began a series of debates that would eventually lead to the passage of the Civil Rights Act of 1866 and then to the passage of the Fourteenth Amendment. These debates were prompted by the Northern States’ reaction to both the passage in many Southern States of laws that severely oppressed the newly

69. In arguing that it is constitutional for the children of illegal aliens to have access to free public education, we do not mean to imply that these children are constitutionally allowed access to all privileges of United States citizenship. For example, we would not argue here that illegal aliens or their children should be granted access to welfare benefits. It is constitutionally required that the children of illegal aliens be provided access to free public education because public education is a right; as will be explained below, in 1868, thirty-six out of the thirty-seven states in the Union recognized this right. At that time, though, there was no similar consensus on welfare as welfare was considered a privilege. If welfare cannot be viewed as a fundamental right, it cannot be mandatory that illegal aliens and their children be granted access to it.

freed African American citizens and the election by Southern voters of important ex-Confederate officials to high public offices.⁷⁰ Northerners believed that these laws, called “Black Codes,” were meant to relegate freed African Americans to second-class social status by forcing them to live, essentially, as slaves.⁷¹

The North saw the Black Codes as the South’s de facto nullification of emancipation and attempt to reverse its military loss in the Civil War.⁷² In response, Senator Lyman Trumbull of Illinois introduced the Civil Rights Bill on January 5, 1866, which was from its outset a bill designed to effectively override the Black Codes.⁷³ The bill was introduced by the president *pro tempore* as “the bill (S. No. 61) to protect all persons in the United States in their civil rights, and furnish the means of their vindication.”⁷⁴ When presenting the bill to his fellow senators, Senator Trumbull explained:

Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to *destroy all these discriminations*.⁷⁵

Members of the House of Representatives had the same vision. As described by Representative James Wilson of Iowa, who introduced the Civil Rights Bill in the House: “It will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the States on ‘account of race, color, or previous condition of slavery.’”⁷⁶ Clearly, the Thirty-ninth Congress recognized the Black Codes as unfair discriminatory measures and, as such, decided to overturn them by adopting a federal Civil Rights Bill (which eventually became the Civil Rights Act of 1866). Congressmen

70. Calabresi & Matthews, *supra* note 14, at 1403.

71. John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1402 (1992).

72. See Calabresi & Matthews, *supra* note 14, at 1403–04.

73. Harrison, *supra* note 71.

74. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

75. *Id.* (emphasis added).

76. *Id.* at 1118.

wanted to end discrimination, promote equality, and ensure that “[t]he states would remain free to create whatever rights they pleased, *as long as they gave them to all citizens.*”⁷⁷ What is important for our argument is not Congress’s legislative intent to establish equal rights between black and white citizens but rather the difference, which Congress made a point of emphasizing, between the rights the Civil Rights Bill guaranteed to citizens and the rights it guaranteed to aliens.

Section 1 of the bill, as it was first introduced in Congress, read:

[A]ll persons of African descent born in the United States are hereby declared to be citizens of the United States, and there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery[;]

. . . .

. . . *but the inhabitants of every race and color*, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.⁷⁸

The use of the word “inhabitants” was clearly intentional, as Senator Trumbull believed that “[w]ith this bill passed into a law and efficiently executed we shall have secured freedom in fact and equality in civil rights to *all persons* in the United States.”⁷⁹ Senator Trumbull explained the list of rights that he specifically included in his draft of the Civil Rights Bill by saying, “These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.”⁸⁰ Senator Trumbull believed these rights were held by *all*

77. Harrison, *supra* note 71, at 1403 (emphasis added).

78. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

79. *Id.* at 476.

80. *Id.*

people, not just citizens. However, section 1 of the Civil Rights Act of 1866, as it was finally passed over President Johnson's veto, reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; *and such citizens, of every race and color*, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.⁸¹

As one can see, from the time that the bill was drafted to the time it was enacted into law, the focus of Section 1 of the act shifted from *inhabitants* (presumably meaning any person living in the United States, including aliens), to *citizens*, which of course refers to only citizens of the United States. In the nineteenth century, aliens were "persons" who often had some rights; however, citizens often enjoyed other rights that were granted only to themselves.⁸² The word

81. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (emphasis added).

82. In his 1848 dictionary, Noah Webster defined the noun "citizen" as meaning:

1. A native of a city, or an inhabitant who enjoys the freedom and privileges of the city in which he resides. 2. A townsman; a man of trade; not a gentleman. 3. An inhabitant; a dweller in any city, town, or place.—4. In a *general sense*, a native or permanent resident in a city or country. —5. In the *United States*, a person, native or naturalized, who has the privilege of exercising the elective franchise, and of purchasing and holding real estate.

WEBSTER, 1848 DICTIONARY, *supra* note 34, at 177. Webster defined the noun "alien" as meaning "[a] foreigner; one born in, or belonging to another country; one who is not entitled to the privileges of a citizen." *Id.* at 28. And, finally, Webster defined the noun "denizen" as meaning:

1. In *England*, an alien who is made a subject by the king's letters patent. He can hold land by purchase or bequest, but cannot enjoy office, trusts, &c., or receive a grant of land from the crown.—*Brande*. 2. A stranger admitted to residence in a foreign country. 3. A dweller; as, the *denizens* of air.—*Pope*.

Id. at 279. It can be seen that, in America during the Reconstruction period, the word "citizen" was commonly understood to mean something different than the words "alien" and "denizen."

“inhabitants” in the draft version of section 1 of the Civil Rights Bill was changed to “citizens” in the final version of the Civil Rights Act in order to make it clear that aliens would not be allowed to own real property.⁸³ Republican Edward Cowan of Pennsylvania was one of the strongest proponents for the change in wording:

Nobody denied that after foreigners were naturalized they could purchase land. That is not the question. The question is whether the General Government before naturalization can confer upon aliens this privilege. . . . These statutes do not provide that a naturalized citizen shall not have all the rights of every other citizen, but provide what his rights shall be before naturalization, so that the power which the United States originally had has nothing to do with the question.

. . . .

. . . Then, I say again, that by the provisions of this bill, without naturalizing the alien, without bringing him within that uniform rule which must be adopted before any alien can be naturalized, he is made here able to hold lands⁸⁴

Senator Cowan’s concern regarding the use of “inhabitant” was based solely on the notion that aliens might be able to own property, not that they might have rights at all. Democrat Reverdy Johnson of Maryland had the same concern and explained that he interpreted the bill in the following manner:

That is to say, that no State shall discriminate at all between any inhabitants within her limits on account of any race to which they may belong, whether white or black, on account of color, if they are not white, or on account of their having been previously in a state of slavery, so that the white as well as the black is included in this first section; and if this passes, and we have the authority to pass it, then it would be impossible, as I think, for any State in the Union to draw any distinction as between her citizens who have been there from birth or who have been residents there for any length of time, and he who comes into the State now for the first time as a foreigner; he

Citizens could vote and hold real estate, while denizens were “strangers admitted to residence in a foreign country” and aliens were “not entitled to the privileges of a citizen,” such as the right to vote.

83. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Johnson).

84. *Id.* at 500 (statement of Sen. Cowan).

becomes an “inhabitant.” If he comes from England or from any of the countries of the world and settles in the State of Illinois, that moment he becomes an inhabitant, and being an inhabitant, if this bill is to pass in the shape in which it stands, he can buy, he can sell, he can hold, and he can be inherited from.⁸⁵

Senator Johnson understood the bill’s basic purpose—to eliminate discrimination—and only took issue with the fact that noncitizens could “buy,” “sell,” “hold,” and “be inherited from.” Neither he nor Senator Cowan raised complaints about aliens enjoying any of the other rights listed in Senator Trumbull’s draft; they simply did not want aliens to have rights relating to real estate ownership.

As Professor John Harrison points out, though, “[t]o say that aliens were not citizens, and in particular that they could not hold real estate, was not to say that aliens were to be treated as outlaws. On the contrary, civilized countries extended to aliens the protection of the laws.”⁸⁶ Therefore, while Congress did not believe that aliens could own property, aliens were indeed granted equal protection of the laws later by the Fourteenth Amendment. This change is foreshadowed by section 2 of the Civil Rights Act of 1866, which refers to the protection under the law of *inhabitants* as opposed to *citizens*. Section 2 reads:

And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, *any inhabitant of any State or Territory* to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.⁸⁷

In other words, section 2 ensures that any individual who does not grant an *inhabitant* “any right secured or protected by this act,” as outlined above in section 1, will be punished. Of course, the rights

85. *Id.* at 505 (statement of Sen. Johnson).

86. Harrison, *supra* note 71, at 1442.

87. Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27 (1866) (emphasis added).

secured and protected by the act are only the rights guaranteed to citizens by section 1, but the use of the word *inhabitants* here is in tension with the language of section 1, which, as we explained above, was specifically modified from its original list of rights granted to *inhabitants* to a list of rights applicable only to *citizens*. Section 2 protects *all inhabitants* from the deprivation of their rights in a manner different from that of section 1—by threat of a fine or imprisonment. This distinction between section 1 and section 2 is clearly the beginning of the equal protection doctrine, which has come to protect aliens, as well as citizens, from some discriminatory state laws.

2. *Constitutionalizing the Civil Rights Act of 1866*

In both the House and the Senate, congressmen debated whether Congress had authority to adopt such legislation under the Constitution and whether the bill would also convey political rights to African American citizens. Some opponents objected that Congress had power under the Constitution to enact laws to enforce the Thirteenth Amendment's ban on slavery but not to legislate as to civil rights.⁸⁸ Notwithstanding these objections, Congress eventually passed the Civil Rights Act of 1866. President Andrew Johnson vetoed the act on March 27, 1866, saying, "Hitherto every subject embraced in the enumeration of rights contained in this bill has been considered as exclusively belonging to the States."⁸⁹ President Johnson believed the Thirteenth Amendment gave Congress power to pass laws against slavery, but not laws regarding federal civil rights.⁹⁰ The Senate voted to override the President's veto on April 4th, and on April 9th the House followed suit, officially passing the bill as the Civil Rights Act of 1866.⁹¹ It was the first time in the country's seventy-seven-year history that a presidential veto had been overridden as to an important piece of legislation.⁹²

88. See Harrison, *supra* note 71, at 1404.

89. CONG. GLOBE, 39th Cong., 1st Sess. 1680 (1866).

90. See Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 28–29 (1955); Calabresi & Matthews, *supra* note 14, at 1407.

91. Bickel, *supra* note 90, at 29.

92. Calabresi & Matthews, *supra* note 14, at 1408.

Supporters of the Civil Rights Act of 1866 were afraid, however, that President Johnson's concern that the act exceeded Congress's powers might be thought valid. There was special concern that, if the constitutionality of the act were challenged in federal court, the courts might strike down the civil rights act as a congressional overreach not supported by the Thirteenth Amendment.⁹³ This fear led the supporters of the Civil Rights Act of 1866 to try to constitutionalize the act.⁹⁴ Thus was born the congressional push for the Fourteenth Amendment.

While it was still considering the Civil Rights Bill, Congress formed a Joint Committee on Reconstruction⁹⁵ to resolve "whether Congress had power to grant suffrage to blacks or otherwise to protect black rights under the Thirteenth Amendment or any other existing constitutional provision."⁹⁶ The first attempt to write a constitutional amendment was made by Representative John Bingham of Ohio ("the principal drafter of Section 1 of the Fourteenth Amendment"⁹⁷), who proposed to the Joint Committee the language that would eventually become Section 1 of the Fourteenth Amendment on January 12, 1866.⁹⁸ This first draft of the Amendment gave Congress the "power to make all laws necessary and proper to secure to all persons in every State within this Union equal protection in their rights of life, liberty and property."⁹⁹ A subcommittee within the Joint Committee reworked the text and on January 20 proposed the following language:

93. *Id.*

94. "The purpose of the Fourteenth Amendment was at a bare minimum to write the Civil Rights Act of 1866 into the Constitution so that there would be no possibility of it being held unconstitutional or of it being repealed by a later Congress." *Id.*

95. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 48 (1988) (comprising, with respect to the committee, "of five Republicans—William P. Fessenden, J. W. Grimes, Ira Harris, Jacob M. Howard, and George H. Williams—and one Democrat—Reverdy Johnson—from the Senate, and seven Republicans—John A. Bingham, Harry T. Blow, George S. Boutwell, Roscoe Conkling, Justin S. Morrill, Thaddeus Stevens and Elihu B. Washburne—and two Democrats—Henry Grider and Andrew Jackson Rogers—from the House").

96. *Id.*

97. Harrison, *supra* note 71, at 1404.

98. NELSON, *supra* note 95, at 49.

99. *Id.* (quoting BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 46 (1914)).

Congress shall have power to make all laws necessary and proper to secure to all citizens of the United States, in every State, the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property.¹⁰⁰

As William Nelson points out, this draft was actually “clear and unambiguous” in granting Congress the power to legislate about the civil rights of citizens and about the political right to vote.¹⁰¹ The same language was used in yet another draft of the Amendment, upon which the Joint Committee agreed on February 3:

The Congress shall have power to make all laws which shall be necessary and proper to secure to citizens of each state all privileges and immunities of citizens in the several states (Art. IV, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).¹⁰²

Bingham brought this draft out of the Joint Committee and into the House in mid-February 1866, while the Civil Rights Act was still being debated as a bill.

3. Congress debates rights granted to aliens

As with the language of the Civil Rights Act of 1866, the language of the proposal that was to become the Fourteenth Amendment reflected two important, contemporary beliefs regarding alienage: first, that there was a fundamental difference between the rights of citizens and the rights of “people,” including aliens; and second, that despite this difference in rights, aliens still deserved the “equal protection of the laws” to some extent. Bingham explained the need to give aliens some, but not all, of the rights of citizens by saying:

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?¹⁰³

100. *Id.* (quoting KENDRICK, *supra* note 99, at 51).

101. *Id.*

102. *Id.* at 50 (quoting KENDRICK, *supra* note 99, at 61).

103. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866).

In the House of Representatives, Republican Representative Thaddeus Stevens explained the equality idea behind the Fourteenth Amendment as follows:

The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the “equal” protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or another, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford “equal” protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes.¹⁰⁴

Another Congressman, Republican Robert Hale of New York, viewed the Equal Protection Clause in much the same way:

What is the effect of the amendment which the committee on reconstruction propose for the sanction of this House and the States of the Union? I submit that it is in effect a provision under which all state legislation, in its codes of civil and criminal jurisprudence and procedure, affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. . . .

. . . .

. . . [R]eading the language [of the equal protection section of the amendment] in its grammatical and legal construction it is a grant of the fullest and most ample power to Congress to make all laws “necessary and proper to secure all persons in the several States protection in the rights of life, liberty, and property,” with the simple proviso that such protection shall be equal. It is not a mere provision that when the States undertake to give protection which is unequal

104. *Id.* at 2459.

Congress may equalize it; it is a grant of power in general terms—a grant of the right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.¹⁰⁵

Members of both the House and the Senate thus agreed that the Equal Protection Clause meant that all laws made by the states needed to apply to *all persons* equally, as we argued in Part II.¹⁰⁶ Thus, the intent of the legislators when drafting the amendment was the same as the original public meaning of the amendment: “equal protection of the laws” in 1868 meant that all laws were to protect and apply to *all persons* in the same manner.

However, there was much debate in both houses of Congress about how, exactly, aliens would benefit from this bill. As seen in the following discourse between Republican Senator Jacob Howard of Michigan and Senator Cowan, the main problem with granting aliens some rights under the amendment was still the right to own real estate. Consider this exchange in which Howard wishes to change the wording of Section 1, and Cowan rebuts:

Mr. HOWARD. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors [sic] or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. . . .

. . . .

105. *Id.* at 1063–64.

106. We understand that if one reads these statements without an understanding of the textual history and original public meaning of the words of the Fourteenth Amendment, the congressmen’s words may seem to only apply to black Americans (“man of color” in Representative Stevens’s quote, for example). We also understand that not every congressman during the Reconstruction period held these beliefs. However, we provide these quotes to *supplement* the argument we made in Part II of this article, not *supplant* that analysis. The textual analysis above makes it clear that the Fourteenth Amendment’s Equal Protection Clause was applicable to noncitizens at the time of its framing and still today; we hope that this legislative history provides an insight into why the framers of the Fourteenth Amendment wrote the text in such a way that it would apply to noncitizens.

Mr. COWAN. . . . Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? Have they more rights than a sojourner in the United States? *If a traveler comes here from Ethiopia, from Australia, or from Great Britain, he is entitled, to a certain extent, to the protection of the laws. You cannot murder him with impunity. It is murder to kill him, the same as it is to kill another man. You cannot commit an assault and battery on him, I apprehend. He has a right to the protection of the laws; but he is not a citizen in the ordinary acceptation of the word.*

. . . .

So far as the courts and the administration of the laws are concerned, I have supposed that every human being within their jurisdiction was in one sense of the word a citizen, that is, a person entitled to protection; but in so far as the right to hold property, particularly the right to acquire title to real estate, was concerned, that was a subject entirely within the control of the States.¹⁰⁷

Unlike Senator Howard, who seems to be particularly opposed to aliens in this exchange and wanted to write them out of the amendment completely, Senator Cowan recognized that aliens in the United States deserved “protection under the laws.” His only concern was that aliens might gain the right to own land.

Representative Bingham believed that his draft of the Fourteenth Amendment “would give Congress power to eliminate race discrimination throughout the country”¹⁰⁸ through both its Privileges or Immunities *and* Equal Protection Clauses.¹⁰⁹ However, Representatives Roscoe Conkling and Giles Hotchkiss of New York tried to postpone the amendment.¹¹⁰ Hotchkiss, supporting Conkling’s original motion to postpone, believed that, while Bingham’s goal was admirable, the amendment could not be viewed

107. *Id.* at 2890 (emphasis added).

108. Harrison, *supra* note 71, at 1406.

109. “Secondly, it is likely that Bingham thought that *both* clauses of his proposal gave Congress power to forbid discrimination. He regularly ran together the two constitutional provisions from which his proposal derived, the Privileges and Immunities Clause of Article IV and the Due Process Clause of the Fifth Amendment.” *Id.*

110. “When debate [over Bingham’s proposal] concluded, Roscoe Conkling of New York, a member of the Joint Committee, moved that the amendment be postponed. In support of Conkling’s motion, Republican Giles Hotchkiss of New York explained that Bingham’s proposal was not properly designed to achieve its goal.” *Id.* at 1408.

as “permanently securing those rights”¹¹¹ because it gave Congress power to pass civil rights bills but “did not impose a self-executing limitation on the states.”¹¹² The Reconstruction framers wanted not only to secure Congress’s power to pass the Civil Rights Act of 1866, but to write the act into the Constitution so that no future Southern Democratic Congress could repeal it. Congress tried again, and this second attempt became the Fourteenth Amendment.

4. Finalizing the Fourteenth Amendment text

There were two different proposals regarding the manner in which the Joint Committee and Congress should adopt the Fourteenth Amendment. First, a man named R.P.L. Barber wrote a letter to Senator John Sherman of Ohio in which he urged that Congress simply adopt the original proposals from the Joint Committee.¹¹³ The other proposal came from Robert Dale Owen, Jr., a recent immigrant and son of a well-known English radical.¹¹⁴ Owen wrote a new draft of the amendment, and the new section 1 prohibited “discrimination . . . as to the civil rights of persons because of race, color, or previous condition of servitude.”¹¹⁵ The second section “prohibited similar discrimination as to voting rights after 1876;” the third section “reduced the representation of states if, prior to 1876, they denied blacks the vote;” the fourth section “prohibited the payment of Confederate war debts;” and the fifth and final section “granted enforcement power to Congress.”¹¹⁶

The Fourteenth Amendment ultimately followed Owen’s draft.¹¹⁷ His version of the amendment is important for our purposes because, as Representative Hotchkiss recognized upon reading the proposal, its language suggested “that any new constitutional provision be framed as a self-executing guarantee of rights, and not merely as a grant of power to Congress to legislate for the protection of rights.”¹¹⁸ As Representative Hotchkiss explained on February 28, 1866,

111. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866).

112. Harrison, *supra* note 71, at 1408.

113. Nelson, *supra* note 95, at 54.

114. *Id.* at 54–55.

115. *Id.* at 55 (quoting KENDRICK, *supra* note 99, at 83).

116. *Id.* (citing KENDRICK, *supra* note 99, at 83–84).

117. *Id.*

118. *Id.*

I understand the amendment as now proposed by its terms to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power. Congress already has the power to establish a uniform rule of naturalization and uniform laws upon the subject of bankruptcy. That is as far as I am willing that Congress shall go. *The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority.* It is not indulging in imagination to any great stretch to suppose that we may have a Congress here who would establish such rules in my State as I would be unwilling to be governed by. Should the power of this Government, as the gentleman from Ohio [i.e., Bingham] fears, pass into the hands of the rebels, I do not want rebel laws to govern and be uniform throughout this Union.¹¹⁹

Representative Hotchkiss was specifically concerned that the Southern Democrats would regain control of Congress and repeal the civil rights laws the Reconstruction Congress had worked so hard to pass. According to Hotchkiss, “The object of a Constitution is not only to confer power upon the majority, but to restrict the power of the majority and to protect the rights of the minority.”¹²⁰ Owen’s draft of the amendment was the only draft that would actually enshrine the rights of equality and liberty in the Constitution, where the political vacillations and vicissitudes of Congress could not touch them. Owen’s proposal was also important because “its first section explicitly guaranteed blacks equality of civil rights, and after 1876, its second section conferred equality of voting rights as well.”¹²¹ There was no mention of immigrants or noncitizens but, as explained above, the draft did prohibit “discrimination . . . as to the civil rights of *persons* because of race, color, or previous condition of servitude,”¹²² and noncitizens (as we argue in Part II) are indeed “persons” who deserve the equal recognition of their civil rights.

Owen’s proposal was changed and made slightly more ambiguous, though, when the Joint Committee, “on the motion of Bingham and with only two Democrats in opposition, agreed to tack on an

119. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (emphasis added).

120. CONG. GLOBE, 42nd Cong., 1st Sess. 115 (1871).

121. Nelson, *supra* note 95, at 55.

122. *Id.* (emphasis added) (quoting KENDRICK, *supra* note 99, at 83).

additional section . . . onto the Owen proposal.”¹²³ This new section, spearheaded by Bingham, was mostly in line with what Owen had already proposed:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.¹²⁴

This language would eventually become the main text for Section 1 of the ratified Fourteenth Amendment. The reason for this change is not immediately clear, but Professor William Nelson speculates that this section “might . . . have been designed to protect against nonracial discriminations, as, for example, discriminations on religious or political grounds.”¹²⁵ Or perhaps “Bingham meant not merely to secure an equality of rights, as Owen did, but to protect some rights absolutely.”¹²⁶ His true motivation remains unclear, though, and the “additional section may merely have been redundant,” so the Joint Committee removed this section from the “proposed Fourteenth Amendment by a 7–5 vote.”¹²⁷

How, then, did Bingham’s words, crucial to the security of the equal protection and due process of *all persons*, not just citizens, get incorporated into what is now the Fourteenth Amendment?

As the draft was debated in both houses of Congress and by the Joint Committee, Owen’s proposal was modified to remove sections 2 and 3, which “guarantee[d] voting rights to blacks after 1876 and reduc[ed] the representation of states which denied blacks the vote prior to that date.”¹²⁸ Congress created new versions of sections 2 and 3, which “reduc[ed] the representation of states that did not allow blacks to vote” (section 2) and that “barr[ed] many white Southerners from the franchise” (section 3).¹²⁹ These changes were probably enacted to address the issue of black suffrage without explicitly

123. *Id.*

124. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866)).

125. *Id.* at 56.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

granting former slaves the right to vote, as Owen's original sections 2 and 3 had done.

With Owen's draft overhauled to such an extent, Bingham saw the opportunity to supplant the narrow interpretation of civil rights—Owen's draft prohibited “discrimination . . . as to the civil rights of persons because of race, color, or previous condition of servitude,”¹³⁰ as discussed above—with his own broader text, which he had tried to add once before:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.¹³¹

This time, Representative Bingham's “motion was adopted by a 10-3 vote, with a combination of radical and moderate Republicans in opposition and a similar combination of Republicans, together with three Democrats, in support,”¹³² thereby making Bingham's equal protection language the new Section 1 of the amendment. The diversity of support and opposition for this new version of the amendment indicates just how divided Congress was over the issue. Those Republicans who voted against the Owen-Bingham hybrid probably wanted a greater push for black suffrage, while the few Democrats who supported the amendment perhaps recognized the necessity of a universal declaration of the protection of certain rights for all people.

Between the first Owen draft and the final Owen-Bingham “omnibus measure,”¹³³ the most important (for our argument) change was the substitution of Bingham's equal protection language for Owen's more specific civil rights phrasing. This change “took place behind closed doors,”¹³⁴ so it is unclear why the passages were switched; however, Nelson speculates that “the committee decided to introduce the concept of due process into section one in order to

130. *Id.* at 55 (quoting KENDRICK, *supra* note 99, at 83).

131. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866)).

132. *Id.* at 56.

133. *Id.* at 57.

134. *Id.*

guarantee that, in regard to fundamental personal rights, state law would be procedurally fair as well as substantively equal.”¹³⁵

If this is true, our argument gains credence; the framers of the Fourteenth Amendment might have added Bingham’s text because they wanted to secure fairness in court as well as equality under the law for all persons. The new section 1 also included a “provision reducing the representation of states that denied the right to vote to males over the age of twenty-one.”¹³⁶ This move can be seen “either as a remedy for state violations of voting rights protected by section one or as an authorization for the denial of voting rights to blacks.”¹³⁷ The contradiction is somewhat confusing, but exemplifies just how divided the Thirty-ninth Congress was on the issue of black suffrage. Further changes to the omnibus measure included a “new section three,” which “deprived all persons who had voluntarily supported the Confederate cause of the right to vote in federal elections prior to 1870” and section 4, which “guaranteed payment of the Union war debt, prohibited payment of the Confederate debt, and barred the payment of compensation to former slaveowners for their loss of their slaves.”¹³⁸ Changes also included separating out section 5 from section 1.¹³⁹

5. Ratifying the Fourteenth Amendment

The new, combined Owen-Bingham amendment “was approved by the Joint Committee on April 28 and reported on April 30 to both the Senate and the House.”¹⁴⁰ The amendment received mixed reactions. For example, Connecticut Senator James Dixon worried about Southern opposition to the bill and argued:

The amendment proposed is right enough, if the reconstruction committee can get any southern State to accept it. But unless they do so, it is of course only a shot in the air, which may be right and true, but will hit nowhere—unless indeed it falls upon the heads of the gunners. Is it not far wiser for Congress to make sure of what it

135. *Id.*

136. *Id.*

137. *Id.* at 58.

138. *Id.*

139. *Id.*

140. *Id.* at 57.

has done; to cry “Enough for this time;” to be content that it has secured the supremacy of law and justice in all our territory; and to admit at once to their seats all Representatives and Senators who can take the prescribed oaths?¹⁴¹

Representative Thaddeus Stevens, a member of the Joint Committee and a congressman very committed to the amendment’s cause, had a different take:

The first section prohibits the states from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to *any person* within their jurisdiction the “equal” protection of the laws.

I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. . . . Now different degrees of punishment are inflicted . . . I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen. . . . And yet certain of our distinguished friends propose to admit State after State before this [amendment] becomes a part of the Constitution. What madness! Is their judgment misled by their kindness; or are they unconsciously drifting into the haven of power at the other end of the avenue? I do not suspect it, but others will.¹⁴²

Despite the criticism, “the omnibus amendment passed the House as proposed, but it faced difficulties in the Senate.”¹⁴³ It stalled in the Senate until June 8, when it passed with two more significant changes. Section 1 was expanded to contain “a definition of citizenship,” and Section 3 was considerably weakened—instead of disfranchising all those who had supported the Confederacy, it merely barred from federal office those Confederate supporters who prior to the Civil War had taken an oath to support the Constitution.”¹⁴⁴ The House agreed

141. CONG. GLOBE, 39th Cong., 1st Sess. 2332 (1866).

142. *Id.* at 2459 (first emphasis added).

143. *See* Nelson, *supra* note 95, at 58.

144. *Id.*

to all of these changes on June 13, and the amendment was finally sent off to the states for ratification.¹⁴⁵

On June 25, 1866, Connecticut became the first state to ratify the amendment, and by the end of that year, five more states had ratified it.¹⁴⁶ Eleven states ratified the amendment in January 1867, and by June of that year, twenty-two states had ratified it.¹⁴⁷ Finally, by July 1868, the final six states necessary for passage of the amendment had ratified, and despite New Jersey and Ohio's attempted withdrawals of their ratifications, Secretary of State William Henry Seward declared the Fourteenth Amendment ratified as part of the United States Constitution on July 28, 1868.¹⁴⁸

145. *Id.*

146. *Id.* at 59.

147. *Id.*

148. *Id.* at 59–60. There has been debate about whether the Fourteenth Amendment was ratified legally due to Congress's requirement that the Confederate states ratify the amendment in order to regain representation in Congress. Bruce Ackerman, of Yale Law School, believes that the Fourteenth Amendment was ratified in violation of the ratification process laid out in Article V. Ackerman argues:

The facts are these: once the Thirty-ninth "Congress" made its proposal, the Fourteenth Amendment was sent to all existing governments of the South as well as the North. When one Southern government, Tennessee, ratified the amendment, the Republicans immediately admitted its representatives to Congress. But the other ten Southern states rapidly rejected the Congressional initiative—often justifying their decision by asserting that they had been unconstitutionally excluded from deliberating and voting on its proposal. Since there were never more than thirty-seven states in the Union during this period, a blocking veto of ten had been assembled. Worse yet, there were important pockets of opposition in the North as well. The Fourteenth Amendment seemed doomed.

Until Congress intervened with a series of Reconstruction Acts in the spring and summer of 1867. These revolutionary statutes divided the ten Southern states into five military districts and placed the Union Army in control of any further transition to statehood. . . . After revolutionizing the South's political class, the acts instructed the Army to supervise the election of delegates to constitutional conventions who would then offer their proposals for approval by the (redefined) People of each state before they were finally submitted to Congress. . . .

. . . Congress was not content to determine whether the new constitutions were truly "republican" before allowing Southern representatives to take their seats on Capitol Hill. Instead, it left them out in the cold until "said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the thirty-ninth Congress, and known as article fourteen." Indeed, even ratification would not suffice. The state would remain unrepresented until "said article shall have become a part of the Constitution of the United States." Only then would the bar be raised and military rule be lifted.

These last two Congressional provisions—enacted over presidential veto—are qualitatively different from all that came before. Up to now, it was possible to drape

The Fourteenth Amendment was written to address more issues than just those regarding equality—it was “an omnibus proposal that dealt simultaneously with four of the leading problems of Reconstruction: the status of the Civil Rights Bill, apportionment of representatives, suffrage, and eligibility of former rebels for state and federal office.”¹⁴⁹ What has made the amendment famous, though, is its second sentence in Section 1, which is derived from both the Civil Rights Act of 1866 and Bingham’s first attempt at drafting the Fourteenth Amendment. Section 1 of the amendment in its final form reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

a legal fig leaf over each Congressional action. *But at this point, we are in the presence of naked violations of Article Five.* These last two Congressional conditions cannot conceivably be justified by the Guaranty Clause, however expansively interpreted—for the simple reason that Congress had, by this point, already approved the states’ constitutions as republican. Nevertheless it was still asserting its power to keep the states out in the cold until they went along with its demand to ratify the Fourteenth Amendment.

BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 2: TRANSFORMATIONS* 110–11 (1998) (emphasis added).

However, other scholars disagree with Ackerman’s claims. John Harrison of the University of Virginia Law School responds to and rebuts Ackerman’s arguments in an article published in the *University of Chicago Law Review*. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001). He says:

Finally, the southern ratifications may have been effective, despite legal defects in the ratifying governments, because those governments had de facto authority and hence were able to bind their states. The legal authority of de facto governments is a familiar principle of international law that has been followed in American constitutional practice, and the Article endorses it in this context. Either the political question [of whether the identification of a state’s lawful government is a political question to be decided by the political branches of the national government and ultimately by Congress] or the de facto government thesis must confront the argument that southern ratifications were invalid because extorted through unlawful federal threats. The Article maintains that it is doubtful whether the ratifications were so extorted, and claims that in any event Article V of the Constitution does not implicitly invalidate ratifications made in the face of illegal threats.

Id. at 375. We agree with Harrison’s scholarship and believe, for the purposes of this article, that the Fourteenth Amendment was passed pursuant to the Article V amendment process.

149. Harrison, *supra* note 71, at 1408. The Fourteenth Amendment increased slave states’ representation in the House and Electoral College after repealing the three-fifths clause of U.S. CONST. art. I, § 2, cl. 3.

United States; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.¹⁵⁰

As seen in the excerpts discussed above, Section 1 distinguishes between the entitlements of *citizens* and the entitlements of *persons*, including aliens. States cannot abridge the privileges or immunities of United States *citizens*, but they also cannot deprive *any person* of life, liberty, or property without due process and cannot deny *any person*, including noncitizen aliens, the equal protection of the laws. As of 1866, aliens were granted due process of the law as well as the more vague and novel right to “equal protection of the laws.” Inhabitants of the United States who are not citizens may not have the political rights of American citizens, but they have had *some rights*, constitutionally, since the Fourteenth Amendment was ratified.

B. What, Exactly, Does “Within Its Jurisdiction” Mean?

Before going further, we must address the meaning of the phrase “within its jurisdiction” in Section 1’s Equal Protection Clause. Current legal scholarship and historical evidence suggests that this phrase requires that a state provide fire and police services to *any person* within its borders regardless of citizenship status. First, taking the “literal meaning” approach used in Part II, let us define “protection.” Webster gives the following meaning:

1. The act of protecting or preserving from evil, loss, injury, or annoyance. 2. That which protects or preserves from injury. 3. A writing that protects; a passport or other writing which secures from molestation. 4. Exemption, as from molestation or arrest.—Syn. Preservation; defense; guard; shelter; refuge; security; safety.¹⁵¹

Looking at this definition as well as synonyms, the word “protection,” in the Equal Protection Clause, could refer narrowly to the provision of some sort of police or fire service as well as protection under the criminal and civil law. “The act of protecting or preserving from evil, loss, injury, or annoyance” can be construed as police and fire services because both crimes and destruction-via-fire can be

150. U.S. CONST. amend. XIV, § 1 (emphasis added).

151. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 790.

considered “evil, loss, injury, or annoyance.”¹⁵² The synonyms “defense,” “guard,” “security,” and “safety”¹⁵³ can also all be applied to police or fire services—police personnel and firemen act as defenders and guards on a state’s behalf. Therefore, based on our originalist argument, it seems that the idea of “protection,” in the expanded sense of “guarding” or “security” and police or fire services, can be applied to the Fourteenth Amendment; “equal protection of the laws” could be construed as “equal safety” or “equal access to fire and police services” within this reading. However, our aim in this Article is to address access to *public education* as a constitutional right, not access to *fire and police services* as a constitutional right.

As Professor John Harrison argues, when Congress was in the process of debating the 1871 Ku Klux Klan Act, the entire justification behind the act came from the Fourteenth Amendment.¹⁵⁴ This Act “was the third of the four major Reconstruction civil rights laws,” and it “was directed at private violence against freed slaves and Republicans and at state officials who failed to deal with such violence.”¹⁵⁵ Professor Harrison explains that “[t]he claim that Congress had power to act directly against private outrages like those of the Klan usually rested not on the theory that the Equal Protection Clause forbade discrimination in general, but on a belief that it specifically forbade discrimination in law enforcement—the protection of the laws.”¹⁵⁶ This concept of equal protection of the laws as applied to nondiscrimination in law enforcement is seen in the text of the 1871 Ku Klux Klan Act itself, which reads:

Be it enacted . . . [t]hat any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or

152. *Id.*

153. *Id.*

154. Harrison, *supra* note 71, at 1437.

155. *Id.* at 1437 n.213.

156. *Id.* at 1437.

circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the [Civil Right Act of 1866]; and the other remedial laws of the United States which are in their nature applicable in such cases.¹⁵⁷

With this act, congressional Republicans “focused on the states’ duty to protect life, liberty, and property”¹⁵⁸ and attempted to provide freed slaves and Republicans in the South with ways to seek justice for the discrimination and violence they faced. However, in order to protect these racial and political minorities, the Ku Klux Klan Act also granted the president (at the time, Ulysses S. Grant) the ability to suspend *habeas corpus* in any state that did not follow the new rules set out in other sections of the act:

That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the constituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of *habeas corpus*, to the end that such rebellion may be overthrown: *Provided*, That all the provisions of the second section of [the *Habeas Corpus* Act of March 3, 1863], which relate to the discharge of prisoners other than prisoners of war, and to the penalty for refusing to obey the order of the court, shall be in full force so far as the same are applicable to the provisions of this section: *Provided further*, That the President shall first have made proclamation, as now provided by law, commanding such insurgents

157. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2012)).

158. Harrison, *supra* note 71, at 1437.

to disperse: *And provided also*, That the provisions of this section shall not be in force after the end of the next regular session of Congress.¹⁵⁹

However, it was not this controversial section that would eventually cause the Supreme Court to overturn the Ku Klux Klan Act in the 1883 case *United States v. Harris*.¹⁶⁰ Instead, the Court struck down the act due to the Equal Protection Clause.

On August 14, 1876, Sheriff R.G. Harris and nineteen other men formed a lynch mob and stormed a Tennessee jail, killing one of the prisoners.¹⁶¹ Under section 2 of the Ku Klux Klan Act, two or more persons were forbidden from conspiring together

for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or shall conspire together for the purpose of in any manner impeding, hindering, obstructing, or defeating the due course of justice in any State or Territory, with intent to deny to any citizen of the United States the due and equal protection of the laws, or to injury any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws.¹⁶²

Therefore, at the time of Harris's crime, he and his conspirators violated section 2 of the Ku Klux Klan Act, and the federal government levied criminal charges against Harris and his conspirators under the act.¹⁶³ Unfortunately, and quite incorrectly, the Supreme Court ruled in favor of Harris, striking down the Act and its attempt to provide *all persons within the United States* with the equal protection of the laws.¹⁶⁴

159. Ku Klux Klan Act, ch. 22, § 4, 17 Stat. 13 (1871) (first emphasis added).

160. 106 U.S. 629 (1883).

161. *Id.* at 629–31.

162. Klu Klux Klan Act, ch. 22, § 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985 (2012)).

163. *Harris*, 106 U.S. at 630.

164. *Id.* at 644.

Justice Woods, delivering the opinion of the Court,¹⁶⁵ held that the Fourteenth Amendment only applied to actions taken by the states, not by individuals.¹⁶⁶ He based his reasoning on Chief Justice Waite's opinion in *United States v. Cruikshank*:

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . .

. . . .

. . . [In addition, t]he fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.¹⁶⁷

In his own words, Justice Woods then continued to explain, “[T]he legislation under consideration finds no warrant for its enactment in the Fourteenth Amendment” because Harris and his men were acting as individuals.¹⁶⁸ Woods asserted:

When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary,

165. Justice Harlan dissented, but did not write a dissenting opinion.

166. *Harris*, 106 U.S. at 637–40.

167. *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875).

168. *Harris*, 106 U.S. at 639.

the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.¹⁶⁹

Unfortunately, because the state of Tennessee, as a single entity, had not taken action against the members of the prison—Harris and his men stormed it as individual agents—Justice Woods and his majority deemed the violent actions unpunishable under the Fourteenth Amendment. And, because the Ku Klux Klan Act attempted to apply Fourteenth Amendment language and philosophy to actions taken by individuals as well as actions taken by states, Justice Woods struck down the act as a whole.

Justice Woods’s entire argument in *Harris* was grounded in the fact that the Fourteenth Amendment can only apply to actions taken by the states, not individuals, and so the Ku Klux Klan Act was unconstitutional because it attempted to apply the Fourteenth Amendment to actions taken by individuals. He began his discussion of the Fourteenth Amendment by saying, “It is perfectly clear from the language of the first section [of the Fourteenth Amendment] that its purpose also was to place a restraint upon the action of the states.”¹⁷⁰ He cited the *Slaughterhouse Cases*¹⁷¹ as well as *United States v. Cruikshank* as previous Supreme Court cases that also upheld the Fourteenth Amendment as applying specifically to the states, and he ended this section of the majority opinion by proclaiming,

As, therefore, the section of the [the Ku Klux Klan Act] under consideration is directed exclusively against the action of private persons, *without reference to the laws of the states or their administration by the officers of the state*, we are clear in the opinion that it is not warranted by any clause in the Fourteenth Amendment to the Constitution.¹⁷²

Justice Woods’s suggestion that the Ku Klux Klan Act was unconstitutional because it applied its Fourteenth Amendment language only to individual actors and not states or “officers of the state” is germane to our argument in this Article: if the Fourteenth Amendment can *only* apply to the states, as Woods suggests, the

169. *Id.*

170. *Id.* at 638.

171. 83 U.S. (16 Wall.) 36 (1873).

172. *Harris*, 106 U.S. at 640 (emphasis added).

appellants had every right to take Texas to court in *Plyler v. Doe*. The issue in *Plyler* was an action taken *by a state* against a group of minority individuals; using Justice Woods's own insistence that the Fourteenth Amendment can be applied solely to actions taken by states, reliance on the Fourteenth Amendment was appropriate in *Plyler* because Texas was taking action against noncitizen children residing within its jurisdiction.

Critics of *Plyler v. Doe* might point out that the noncitizens tried in *Plyler* were within Texas's jurisdiction illegally, and as such the Equal Protection Clause should not apply to them. As discussed below, there are two arguments that together refute this line of thinking. First, the phrase "within its jurisdiction" was intended to emphasize that states were not responsible for members of Native American tribes living in the state. Second, at the time of the Fourteenth Amendment's ratification, there were no formal immigration or naturalization laws.

C. "Within Its Jurisdiction" and Native American Sovereignty

Professor Gerald L. Neuman explains the complex relationship between Congress and Native Americans during the 1860s:

The legislative history and the received judicial construction of the citizenship clause confirm that the framers of the Fourteenth Amendment did deny constitutionally mandated citizenship to a few categories of children, whom they regarded as not "*subject to the jurisdiction*" of the United States. These were the common law exceptions for aliens closely associated with a foreign government, and an American addition—native Americans living under tribal quasi-sovereignty.¹⁷³

Native Americans who lived in tribal societies were "governed by their own legal systems" and were "under the protection of their tribes, not of the state or federal government."¹⁷⁴ Many Native American tribes had both "legal and military independence . . . from state or federal governance"¹⁷⁵ and, as such, the phrase "within its jurisdiction" was included in the Fourteenth Amendment to underscore the fact that states were not responsible for providing

173. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 171 (1996) (emphasis added).

174. *Id.* at 172.

175. *Id.*

equal protection under or due process of the law to the Native American tribes living within their borders. Native American tribes functioned as their own self-governed communities within the United States, and the framers of the Fourteenth Amendment did not wish to change that.

The text of Section 2 of the Fourteenth Amendment clearly recognizes that Native American tribes are populations that *live within* the United States but are not *administrated by* the United States government. Section 2, which deals with apportionment of congressional representatives and the consequences of denying votes to voting-age males, starts with the phrase “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, *excluding Indians not taxed*.”¹⁷⁶

At the time of the Fourteenth Amendment’s ratification, Native Americans might have lived within a state’s borders, but if they were not counted in Congressional apportionment, they clearly had no part in America’s political process. To the framers of the Fourteenth Amendment, Native Americans were their own sovereign nations with their own systems of government that lived on U.S. soil. As such, Native Americans were inhabitants of the state in which they lived, but they were not “within the jurisdiction” of that state.

The status of Native Americans was hotly contested throughout the debates of the various Reconstruction Congresses, and as early as 1862, it was clear that Native Americans (referred to as “Indians”) were separate entities. Representative Bingham said during a debate about naturalization:

Who are *natural-born* citizens but those born within the Republic? Those born within the Republic, whether black or white, are citizens by birth—natural-born citizens. There is no such word as *white* in your Constitution. Citizenship, therefore, does not depend upon complexion any more than it depends upon the rights of election or of office. . . . Gentlemen can find no exception to this statement touching natural-born citizens except what is said in the Constitution in relation to Indians. The reason why that exception was made in the Constitution is apparent to everybody. The several Indian tribes were recognized at the organization of this Government as independent sovereignties. They were treated with

176. U.S. CONST. amend. XIV, § 2 (emphasis added).

as such; and they have been dealt with by the government ever since as separate sovereignties. Therefore, they were excluded from the general rule.¹⁷⁷

The sovereignty of Native American tribes was especially important during the creation of the Civil Rights Act of 1866. Members of Congress recognized that, because of their sovereignty, Native Americans neither paid taxes nor were counted among the population for apportionment purposes. As Senator Trumbull explained:

The Constitution of the United State excludes them from the enumeration of the population of the United States, when it says that Indians not taxed are to be excluded. It has occurred to me that perhaps an amendment would meet the views of all gentlemen, which used these constitutional words, and said that all persons born in the United States, excluding Indians not taxed, and not subject to any foreign Power, shall be deemed citizens of the United States.¹⁷⁸

Likewise, as Senator Doolittle explained:

Indians not taxed were excluded because they were not regarded as a portion of the population of the United States. They are subject to the tribes to which they belong, and those tribes are always spoken of in the Constitution as if they were independent nations, to some extent, existing in our midst but not constituting a part of our population, and with whom we make treaties.¹⁷⁹

This notion of interacting with Native American tribes through treaty-making also set the Native Americans apart from aliens, citizens, or other “persons” falling under the “within its jurisdiction” clause. This idea can be seen in the following debate between Senators Sumner and Johnson about whether the United States controlled the actions of Native American tribes:

Mr. SUMNER. Allow me to ask the Senator whether we do not always deal with the Indians through the treaty-making power?

Mr. JOHNSON. We have done so, but not necessarily.

Mr. SUMNER. Is it not the habit?

177. CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862).

178. CONG. GLOBE, 39th Cong., 1st Sess. 527 (1866).

179. *Id.* at 571.

Mr. JOHNSON. Certainly it is; but I am dealing with it now as a question of power. We have dealt with them as a treaty-making power, but it is not because there ever was a doubt that Congress could deal with them by legislation; and, in point of fact, although we have dealt with them as a treaty-making power, we have done so by making them make the treaty. It is no treaty-making power in the ordinary acceptation of the term; that is to say, the parties are not equal.¹⁸⁰

The United States made treaties with Native American tribes but did not control their affairs or have power over their people. In this way, Native Americans had sovereignty but no right to vote. Congress recognized this and had no plans to change Native Americans' voting status:

Mr. KASSON. . . .

. . . .

Now, sir, in the history of this country we have excluded certain classes generally from taking part in the election. We have excluded the Chinese, we have excluded all pagans, we have excluded Indians as a general rule, we have excluded white males under twenty-one years of age, we have excluded women of all ages irrespective of intelligence or tax paying.¹⁸¹

Throughout the Reconstruction debates there was no question that Native American tribes were their own entities, and the congressmen involved in drafting and ratifying both the Thirteenth and Fourteenth Amendments did not wish Native Americans to reap the benefits that the Amendments provided. The phrase “within its jurisdiction” was almost certainly included in the Amendment because Native Americans fell completely outside of both state and federal jurisdictions.

D. Immigration During the Reconstruction Period: No Federal Laws, “Legal,” or “Illegal”

Even though the phrase “within its jurisdiction” was written into Section 1 of the Fourteenth Amendment to demonstrate the sovereignty of Native American tribes, it still means that *any person* that a state might have governmental control over is owed both equal protection and due process of the laws. As such, critics of this Article's

180. *Id.* at 506.

181. *Id.* at 237.

dissection of *Plyler v. Doe* might argue that the alien children were indeed within Texas's jurisdiction but were there illegally, so the Equal Protection Clause could not apply to them. We think that argument carries little weight because at the time the Fourteenth Amendment was written, there was *no distinction* between "illegal" and "legal" aliens because there were no federal immigration laws.¹⁸²

Professor Neuman argues that "considerable regulation of immigration existed at the state level; most of it enjoyed a degree of federal endorsement; and some of it was backed by federal sanctions."¹⁸³ However, Professor Neuman does note that "the earliest use of the term [illegal alien] that LEXIS or WESTLAW turns up in a judicial opinion occurs in *Waisbord v. United States*, which is itself not a masterpiece of decorum. The term *undocumented alien* is even newer."¹⁸⁴

That the earliest recorded federal use of the term "illegal alien" is from 1950 does not bar the possibility that there existed some publically understood concept of aliens who had come to the United States in an illicit fashion. And it is true that certain states may have had strict immigration policies to protect their borders and regulate the flow of foreigners. As Neuman explains,

[S]tate immigration law in the century preceding 1875 included five major categories: regulation of the migration of convicts; regulation of persons likely to become or actually becoming a public charge; prevention of the spread of contagious diseases, including maritime quarantine and suspension of communication by land; regionally

182. As will be discussed shortly, Congress had passed "immigration law" in the form of the Naturalization Act of 1798, the Alien Enemies Act, and the Alien Act, all passed during John Adams's tenure. However, the first act was repealed in 1802, the second applied only during wartime, and the third expired in 1800. Additionally, a new Naturalization Act was passed in 1802, but that was repealed in 1828. The next Naturalization Act would be passed in 1870. As such, there was no *federal* immigration law on the books at the time of the Fourteenth Amendment's framing and ratification. See NEUMAN, *supra* note 173, at 40–41.

183. *Id.* at 176.

184. *Id.* at 270 n.61 (citation omitted) (citing *Waisbord v. United States*, 183 F.2d 34 (5th Cir. 1950)). Neuman also says,

Illegal alien does appear as a defined term in both 8 U.S.C. § 1365(b) and 29 C.F.R. § 500.20(n), but the two definitions are context driven and inconsistent. The former specifies a category of aliens who were unlawfully in the United States at the time they committed a felony, and the latter reduces to aliens without employment authorization.

Id. at 270 n.62.

varying policies relating to slavery, including the prohibition of the slave trade; and bans on the migration of free blacks, including the seamen's acts.¹⁸⁵

At the federal level, though, there was virtually no restriction on immigration. "Federal statutes backed up the state quarantine laws and state laws barring the importation of slaves or free black aliens,"¹⁸⁶ but, aside from those specialized statutes, there was no real federal immigration policy in place during 1866.

Frank L. Auerbach describes this lack of federal immigration policy in his book *Immigration Laws of the United States*:

Of the four basic courses a sovereign country can follow in formulating its immigration policy—unrestricted immigration, qualitative restriction, quantitative restriction, and prohibition of all immigration—the United States, ever since 1921, has chosen the second and third course by imposing both qualitative and quantitative restrictions on aliens seeking to enter the United States as immigrants. This period was preceded by some forty-five years of only qualitative restrictions and this period, in turn, by *more than one hundred years of immigration unrestricted by federal legislation*.¹⁸⁷

Congress passed the Page Act of 1875 as a "[q]ualitative restriction of immigration"¹⁸⁸ and did not act again on immigration until the Emergency Quota Act of 1921.¹⁸⁹ Moreover, for "more than one hundred years" prior to 1875, federal immigration was essentially unrestricted, back to the time of the signing of the Declaration of Independence, the American Revolution, the founding of our country, and the framing of our Constitution. Indeed, it was not until ten years after the Constitution's ratification that Congress passed "the first federal legislation dealing with" immigration.¹⁹⁰

185. *Id.* at 41–42.

186. *Id.* at 42.

187. FRANK L. AUERBACH, *IMMIGRATION LAWS OF THE UNITED STATES: A TEXTBOOK INTEGRATING STATUTE, REGULATIONS, ADMINISTRATIVE PRACTICE AND LEADING ADMINISTRATIVE DECISIONS, WITH A COMPREHENSIVE INDEX, CITATION GUIDE AND BIBLIOGRAPHY* 2 (1955) (emphasis added).

188. *Id.* at 3.

189. Emergency Quota Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952).

190. AUERBACH, *supra* note 187, at 2 (referencing the Alien Act of 1798, ch. 58, 1 Stat. 570 (expired 1800)).

While anti-immigrant sentiments were certainly present during the period in which the Fourteenth Amendment was drafted, ratified, and enacted, there were no federal anti-immigration laws passed at the time of the Fourteenth Amendment's framing and ratification. Anti-immigrant sentiment was not officially codified into American law until 1875 with qualitative restrictions on immigration and strengthened in 1921 with quantitative restrictions on immigration.¹⁹¹ Both the Page Act of 1875¹⁹² and the Emergency Quota Act of 1921¹⁹³ were passed well after the Fourteenth Amendment's ratification in 1868.

In 1798, during President John Adams's tenure, Congress passed three acts attempting to restrict immigration into the United States: the Naturalization Act of 1798, the Alien Enemies Act, and the Alien Act.¹⁹⁴ The Naturalization Act¹⁹⁵ increased the time necessary for immigrants to become naturalized citizens from five to fourteen years and was repealed in 1802;¹⁹⁶ the Alien Enemies Act,¹⁹⁷ which applied only during wartime, gave the president authority to apprehend and deport aliens if the United States was at war with their home countries;¹⁹⁸ and the Alien Act¹⁹⁹ allowed the president to arrest and deport any alien he thought dangerous, but "it expired by its own terms in 1800, never to be renewed."²⁰⁰ Congress passed another Naturalization Act in 1802²⁰¹ that sought "to make registration at the time of arrival a documentary prerequisite to later naturalization," but it was widely disregarded and was repealed in 1828.²⁰²

Due to the expiry of the three Acts passed in 1798 and the repeal of the 1802 Naturalization Act, "there was no federal legislation restricting the admission to, or permitting the deportation of aliens in,

191. *Id.* at 3, 7.

192. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

193. Emergency Quota Act of 1921.

194. NEUMAN, *supra* note 173, at 40.

195. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802).

196. NEUMAN, *supra* note 173, at 41.

197. Alien Enemies Act of 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21–24 (2012)). The Alien Enemies Act is still in effect today. NEUMAN, *supra* note 173, at 41.

198. NEUMAN, *supra* note 173, at 41.

199. Alien Act of 1798, ch. 58, 1 Stat. 570 (expired 1800).

200. NEUMAN, *supra* note 173, at 40–41.

201. Naturalization Act of 1802, ch. 28, § 2, 2 Stat. 153.

202. NEUMAN, *supra* note 173, at 41.

the United States”²⁰³ until 1875. “Beginning in 1830,” though, “a marked anti-alien feeling developed in the United States primarily directed against the preponderantly Catholic immigration from Ireland.”²⁰⁴ Reacting to this sentiment, Congress considered bills “which proposed some of the measures which later on became part of American immigration law, principally the exclusion of certain undesirable classes . . . and the requirement of certificates to be issued immigrants by American consuls abroad.”²⁰⁵ However, none of these bills were passed.²⁰⁶

Instead, states took matters into their own hands because they “had to carry the expense of caring for the sick, destitute, or otherwise dependent immigrants.”²⁰⁷ Laws such as those passed in New York, California, Louisiana, and Massachusetts, where there were large influxes of immigrants, “provided, for example, for a tax on each immigrant, for inspection of immigrants by State officials, and for bonds in the case of aliens considered unable to be self-supporting.”²⁰⁸ These state laws were not passed to restrict the flow of immigration or to keep immigrants out of their states (even if there was anti-Irish sentiment at the time); they were passed for financial purposes. However, in 1875 the Supreme Court held, in both *Henderson v. Mayor of New York*²⁰⁹ and *Chy Lung v. Freeman*,²¹⁰ that “the power to legislate concerning the immigration and deportation of aliens rested exclusively with the Congress of the United States.”²¹¹

Aside from the lapsed statutes, the only federal action taken on immigration in the United States prior to 1875 (prior to the Fourteenth Amendment’s framing and ratification) was the Burlingame Treaty executed between China and the United States in 1868.²¹² Remarkably, this treaty was not an expression of the anti-Chinese xenophobia apparent in the Chinese Exclusion Acts of 1882

203. AUERBACH, *supra* note 187, at 2.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 2–3.

209. 92 U.S. 259 (1875).

210. 92 U.S. 275 (1875).

211. AUERBACH, *supra* note 187, at 3.

212. *See id.* at 5.

and 1904.²¹³ Rather, its language paralleled the language from the Fourteenth Amendment itself, ratified on the same day the Burlingame Treaty was proclaimed: “This [treaty] recognized the inherent right of man to change his home and allegiance and guaranteed to Chinese subjects such ‘privileges, immunities, and exemptions in respect to travel and residence’ in the United States as might be enjoyed by the citizens or subjects of the most favored nations.”²¹⁴

This treaty shows an acceptance (on the part of the federal government, not necessarily U.S. residents or state legislatures) of certain immigrants living on U.S. soil. It went so far as to grant Chinese subjects certain “‘privileges, immunities, and exemptions in respect to travel and residence’ . . . as might be enjoyed by the citizens or subjects of the most favored nations”²¹⁵! Not only did the Burlingame Treaty use language mirroring the text of the Fourteenth Amendment, but the treaty was proclaimed on the same day as the Fourteenth Amendment’s official ratification. Given how scrutinized, debated, and edited the Fourteenth Amendment’s language was during its framing,²¹⁶ the similarities between language in the Burlingame Treaty and the newly-ratified Fourteenth Amendment must have been intentional. While the Fourteenth Amendment would not—and could not—ever apply its Privileges and Immunities Clause to aliens living on American soil, for a time, Chinese aliens were welcomed with “privileges and immunities” to the United States by our federal government. At least through the year 1868, when the

213. *Id.* at 6. The Chinese Exclusion Act of May 6, 1882, was written to combat “[t]he tremendous influx of Chinese immigrants to the West.” *Id.* at 5. It “provided for suspension of immigration of Chinese laborers to the United States for a period of ten years.” *Id.* at 6. This Act “also barred Chinese from naturalization” and “ordered deported” Chinese immigrants “illegally in the United States,” though it did allow “the entry of Chinese teachers, students, merchants or those ‘proceeding to the United States . . . from curiosity.’” *Id.* at 6 (internal citation omitted). The Act was “extended from time to time, last on April 27, 1904.” *Id.* at 6. The final extension became the Chinese Exclusion Act of 1904. *Id.* This 1904 Act “extended [the 1882 Act] without time limit” and “remained in effect until December 17, 1943, when all Chinese exclusion laws were repealed and Chinese persons were made eligible for immigration and naturalization.” *Id.*

214. *Id.* at 5 (quoting Treaty of Burlingame, China-U.S., art. VI, July 28, 1868, 16 Stat. 739, 740).

215. *Id.*

216. *See supra* Section III.A.

Fourteenth Amendment was ratified, there was no concept of “illegal” alienage in federal or state statutes.²¹⁷

The discriminatory educational policies at issue in *Plyler v. Doe* may have been driven by anti-immigrant prejudice, as xenophobia in the United States grew strongly in the years following 1868²¹⁸ and still lingers in our nation’s collective consciousness. However, the laws that established a canon of federal immigration policy—the Act of March 3, 1875;²¹⁹ the contract labor laws of 1885 and 1887;²²⁰ the Act of March 3, 1903;²²¹ the Act of February 20, 1907;²²² the Immigration

217. Before 1868, the Supreme Court declared state immigration statutes unconstitutional.

218. Cf. *supra* note 187 (briefly explaining the Chinese Exclusion Act of 1882 and 1904, which established the deportation of “illegal” Chinese immigrants); *infra* notes 227–230 (summarizing the evolution of immigration law in the United States from 1875 to 1924, showing that, as the immigrant population in the United States increased, so too grew Americans’ xenophobia).

219. The Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, grew out of “[t]he lack of any control over the movement of immigrants into the United States as a result of the Supreme Court decisions and the increasing volume of immigration.” AUERBACH, *supra* note 187, at 3. This Act was the first of many to have “excluded from admission” certain types of immigrants—in this original Act, the excluded classes of immigrants were “criminals and prostitutes.” *Id.* This Act also “entrusted the inspection of immigrants to collectors of the ports.” *Id.* The Act “first established the policy of federal restriction on immigration,” while later acts, such as the Act of August 3, 1882, and the Act of March 3, 1891, expanded the list of “classes of inadmissible aliens.” *Id.* at 3–4.

220. In 1885 and 1887, Congress “passed the so-called contract labor laws which made it unlawful to import aliens into the United States under contract for the performance of labor or services of any kind.” *Id.* at 3. These laws—the Act of February 26, 1885, ch. 164, 23 Stat. 332, and the Act of February 23, 1887, ch. 220, 24 Stat. 414—were created “[i]n response to the complaints of labor organizations that certain employers were lowering the standards of American labor by importing cheap foreign labor.” AUERBACH, *supra* note 187, at 3. As one may recognize from following current American politics, this “cheap foreign labor” anti-immigrant argument is still being made 130 years later.

221. The Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213, “introduced significant new features into American immigration law,” adding on to the list of “inadmissible” aliens not only undesirables such as “epileptics, persons who had been insane within five years prior to application for admission, persons who had had two or more attacks of insanity, and professional beggars” along with, for the first time, immigrants with certain political beliefs. AUERBACH, *supra* note 187, at 4. Specifically, the Act of 1903 “made inadmissible ‘anarchists, or persons who believe in, or advocate, the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials,’” thereby delineating certain “proscribed opinions” that the United States did not want migrating onto its soil. *Id.* (quoting Act of Mar. 3, 1903, ch. 1012, 32 Stat. 1213, 1214).

222. The Act of Feb. 20, 1907, ch. 1134, 34 Stat. 898, was created “[a]s a result of a further increase of immigration and in response to Presidential messages to Congress.” AUERBACH, *supra* note 187, at 4. The Act “increased the head tax [of 50 cents on each passenger

Act of February 5, 1917;²²³ and the Quota Law of 1921²²⁴—were passed *after* the framing and ratification of the Fourteenth Amendment. As a result, they cannot be used to ascertain the original meaning of the Fourteenth Amendment. Because no federal immigration law existed at the time of the Fourteenth Amendment’s framing and ratification, the alien children in *Plyler v. Doe* could indeed be considered within Texas’s jurisdiction and the Federal Equal Protection Clause rightfully applied to them.

brought to the United States] to \$4.00 and added to the excludable classes” a hefty amount of maladies, such as “imbeciles, feeble minded persons . . . persons afflicted with tuberculosis . . . and women coming to the United States for immoral purposes.” *Id.* The February 20, 1907, Act “also created a Joint Commission on Immigration consisting of three members of the Senate, three members of the House of Representatives, and three other persons, to make an investigation of the immigration system of the United States.” *Id.* This new Joint Commission “completed its investigation by 1911 and published its report in forty-two volumes,” which became “the basis for the comprehensive Immigration Act of February 5, 1917.” *Id.* at 4–5.

223. The Immigration Act of February 5, 1917, ch. 29, 39 Stat. 874, was “passed as a result of the growing demand for more effective restrictions on immigration.” AUERBACH, *supra* note 187, at 6. It greatly expanded the list of “inadmissible classes of aliens” and “codified all previously enacted exclusion provisions,” adding a “controversial provision . . . excluding aliens over sixteen years of age who were unable to read.” *Id.* This literacy-specific provision was the result of twenty years of buildup as “[a] bill providing for a literacy test for immigrants was first passed by Congress in 1897 but was vetoed by President Cleveland and similar bills were subsequently vetoed by Presidents Taft and Wilson.” *Id.* However, the 1917 Act passed despite President Wilson’s veto, and it “placed the literacy requirement on the statute book” while also adding “further restrictions on the immigration of Asian persons by creating the so-called barred zone, natives of which were declared inadmissible to the United States.” *Id.* Finally, this Act “broadened considerably the classes of aliens deportable from the United States and introduced the requirement of deportation without statute of limitation in certain more serious cases.” *Id.* Xenophobia was clearly on the rise and growing ever stronger.

224. The Quota Law of 1921, ch. 8, 42 Stat. 5, “represented a drastic change in American immigration policy” as it “limited the number of aliens of any nationality entering the United States to 3 per cent of foreign born persons of that nationality who lived in the United States in 1910.” AUERBACH, *supra* note 187, at 7. The Quota Law was enacted because of “new demands for restriction on immigration” stemming from “[t]he unsettled conditions in Europe after the first World War” which drove many European immigrants to the United States. *Id.* The Quota Law “represented a drastic change” in the American approach to immigration policy because “[u]p to its enactment, laws restricting immigration were all qualitative in character, in other words, they provided that certain classes of aliens were inadmissible into the United States.” *Id.* Under this new law, federal immigration policy not only barred immigrants from entry based on these certain classes, it also created “quantitative restrictions by putting a ceiling on the total number of aliens whose admission as immigrants was permitted into the United States during any one year.” *Id.* This quota-based immigration restriction would become the new basis for American immigration policy in years to come.

E. Aliens: Protected by the Fourteenth Amendment Since Its Inception

Since the Fourteenth Amendment may apply to any type of noncitizen inhabitant living in the United States, we must examine its original purpose as relating to those persons living in the United States in 1866. As explained above, the Fourteenth Amendment was written to tackle more than just equality—it was “an omnibus proposal that dealt simultaneously with four of the leading problems of Reconstruction: the status of the Civil Rights Act, apportionment of representatives, suffrage, and eligibility of former rebels for state and federal office.”²²⁵ What made the amendment famous, though, is its second sentence, derived from both the Civil Rights Act of 1866 and Bingham’s first draft of the amendment, which neatly distinguishes between the rights of citizens and the rights of persons. Section 1 of the amendment once again reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*; nor shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws.²²⁶

As discussed above, the Fourteenth Amendment distinguishes between *citizens* and *persons*, including aliens. States cannot abridge the privileges or immunities of U.S. *citizens*, but they also cannot deprive *any person* of life, liberty, or property without due process of law and cannot deny *any person* the equal protection of the laws. As of 1868, aliens were granted due process under the law as well as the vaguer concept of “equal protection of the laws.” Some political rights are reserved exclusively for citizens, but aliens have been entitled to *some* constitutional rights since the Fourteenth Amendment was ratified.

Unfortunately, rights were not necessarily granted to every person in America after the passage of the Fourteenth Amendment. This was

225. Harrison, *supra* note 71, at 1408. The Fourteenth Amendment increased slave states’ representation in the House and Electoral College after amending the Three-Fifths Clause of the United States Constitution. U.S. CONST. art. I, § 2, *amended by* U.S. CONST. amend. XIV, § 2.

226. U.S. CONST. amend. XIV, § 1 (emphasis added).

especially evident in California, where, starting in the early 1850s, a large wave of Chinese immigrants came to work in the gold mines, settled there, and formed their own communities.²²⁷ Californians were at first hospitable towards the aliens, but by 1852 they came to resent their new neighbors; the Chinese were an insular community, and it seemed to the Californians that many of them did not wish to be naturalized.²²⁸ To force the Chinese out, the California legislature levied unfair taxes against the aliens (fees related to work in the mines) and enforced them through violence.²²⁹ The Chinese found support from Christian missionaries willing to help the otherwise ostracized community and sought legal recourse by hiring lawyers. But they often faced difficulty in courts because, in California, the Chinese were not allowed to testify.²³⁰

The California Supreme Court held in favor of the Chinese in four major cases related to the discriminatory taxation,²³¹ but

227. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CALIF. L. REV. 529, 534–35 (1984).

228. *See id.* at 536.

229. *Id.* at 539, 539 n.52.

230. *Id.* at 541 n.58, 548–49.

231. In *People v. Downer*, 7 Cal. 169 (1857), the California Supreme Court struck down California's 1855 "Capitation Tax." McClain, *supra* note 227, at 545. The tax had "imposed on the master or owner of each vessel landing passengers incompetent by the laws of the United States or the laws and constitution of this State to become citizens thereof a tax of \$50 for each such passenger." *Id.* at 544 (internal citations omitted). In *Downer*, "it took the justices [of the California Supreme Court] less than half a page of the reports to void the measure as an impermissible interference with the national government's power over foreign commerce." *Id.* at 545.

In *Ex parte Ah Pong*, 19 Cal. 106 (1861), the California Supreme Court held that "[t]he mere fact that [petitioner] was Chinese and living in the mining district . . . did not subject him to the foreign miners' tax." McClain, *supra* note 227, at 558. According to the court,

If the act [creating the Foreign Miners' License Tax] is to be construed as imposing this tax, it cannot be supported, any more than could a law . . . which imposed upon every man residing in a given section of the State a license as a merchant, whatever his occupation.

Ah Pong, 19 Cal. at 108.

In *Ah Hee v. Crippen*, 19 Cal. 491 (1861), "[a] Chinese miner brought a replevin action to recover a horse that had been attached by the county tax collector to enforce payment of the tax." McClain, *supra* note 227, at 558. Importantly, the plaintiff "claimed, in short, equal protection of the laws" because he based his argument on the fact that the Foreign Miners' License Tax "conflicted with article I, section 17 of the California Constitution, which granted foreigners who were bona fide residents the same rights of possession and enjoyment of property as United States citizens." *Id.* The California Supreme Court "chose to decide the case on the

discrimination and racism towards the Chinese was still rampant. Finally, in 1867, China sent Anson Burlingame, “an American minister to the Manchu Court in Peking,” to reevaluate the 1858 Treaty of Tientsin, the last treaty between the United States and China.²³² An amendment to the Treaty of Tientsin was signed in Washington in July of 1868, which stated that “Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.”²³³ Despite the treaty, California still levied miners’ taxes against the Chinese. When the House Ways and Means Committee (along with Senators Benjamin Wade and Roscoe Conkling) visited San Francisco in June 1869 and noted California’s anti-alien discrimination, Congress realized that the states were not following the Fourteenth Amendment and that a change was necessary.²³⁴

In 1870, Republican Senator William Stewart of Nevada submitted a resolution for the Committee on the Judiciary to

inquire if any States are denying to any class of persons within their jurisdiction the equal protection of the law, in violation of treaty obligations with foreign nations and of section one of the fourteenth amendment to the Constitution; and if so, what legislation is necessary to enforce such treaty obligations and such amendment²³⁵

basis of statutory construction” instead of the equal protection argument, but it still ruled in favor of plaintiff. *Id.* at 559.

In *Lin Sing v. Washburn*, 20 Cal. 534 (1862), the California Supreme Court addressed the issue of “the respective power of the state and federal governments in foreign trade and commerce regulation.” McClain, *supra* note 227, at 555. The plaintiff was taxed in San Francisco for two months under the Chinese Police Tax. *Id.* The California Supreme Court used “Chief Justice Marshall’s opinion in the Supreme Court Case, *Brown v. Maryland* [25 U.S. (12 Wheat.) 419 (1827)]” to hold that “[b]y singling out one group of foreigners residing in the state for taxation, the California Legislature was discouraging immigration from that land and was thus discriminating against foreign commerce.” *Id.* at 556. In other words, “the court concluded that the tax on the Chinese was a tax analogous to a tax that discriminated against imports.” *Id.*

232. *Id.* at 561.

233. *Id.* at 563 (quoting The Burlingame Treaty, China-U.S., art. VI, July 28, 1868, 16 Stat. 739, 740).

234. *Id.* at 564–65.

235. CONG. GLOBE, 41st Cong., 2d Sess. 3 (1870).

The Committee reported on California's mistreatment of the Chinese aliens, which it considered a violation of the Fourteenth Amendment, leading Stewart to propose what would become the Civil Rights Act of 1870: "a bill . . . to secure to all persons the equal protection of the laws."²³⁶ The importance of this Act cannot be overstated, especially for our thesis, because it was spurred by the mistreatment of *aliens*, not citizens, and its purpose was to ensure that the Fourteenth Amendment was applied properly to all *persons*.

The first proposed text of what would become the 1870 Act read as follows:

Be it enacted, &c., That all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.

SEC. 2. *And be it further enacted*, That any person who, under color of any law, statute, ordinance, regulation, or custom shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding \$1,000 or imprisonment not exceeding one year, or both, in the discretion of the court.

SEC. 3. *And be it further enacted*, That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April 9, 1886, is hereby reenacted,

236. *Id.* at 323.

and said act, except the first and second sections thereof, is hereby referred to and made a part of this act.²³⁷

The text is very similar to the Civil Rights Act of 1866, with three major differences. The first is the use of the phrase “all persons within the jurisdiction of the United States”—as we have already explained, there was a clear difference between the original public meaning of the words “persons,” “inhabitants,” and “citizens.” The 1866 Act’s original draft used inhabitants, as shown above, and the final Act gives only citizens the rights listed in section 1. The Fourteenth Amendment uses “citizens” in one instance and “persons” in another to emphasize that there are rights granted to U.S. citizens not afforded to aliens. The use of “persons” here is intentional and is a clear indicator that this bill was drafted to protect aliens.

The second difference is the inclusion at the end of section 1 of the sentence:

No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.²³⁸

This phrase is likely aimed at California, which, as previously discussed, was unfairly taxing its Chinese alien inhabitants. It applies to all states, though, and can, in a way, be read as a modified equal protection clause. It says that a state may not impose a tax on a certain group of aliens unless all aliens in the state are taxed equally. It is not quite the same as the Fourteenth Amendment’s Equal Protection Clause because it only necessitates equality among aliens, not among *all persons*; however, the wording and the concept of equal taxation for all aliens implies that Fourteenth Amendment equal protection logic applies to the situation.

The final, most important difference between the Civil Rights Act of 1866 and the Civil Rights Act of 1870 is the new phrase “[t]hat all persons within the jurisdiction of the United States, Indians not taxed excepted, shall have the same right . . . *to the full and equal benefit of all laws* and proceedings for the security of person and property as is

237. *Id.* at 1536.

238. *Id.* (statement of Sen. Stewart).

enjoyed by white citizens.”²³⁹ Webster defines “benefit” as “1. An act of kindness; a favor conferred. 2. That which is useful or beneficial; a word of extensive use, and expressing whatever contributes to promote prosperity and happiness. . . SYN. Advantage; profit; service; use; avail.”²⁴⁰ Therefore, the 1870 Act’s full-and-equal-benefit-of-the-laws concept goes further than just the “equal protection of the laws” laid out in the Fourteenth Amendment: the Civil Rights Act of 1870 grants to all persons both equal protection and the “full and equal use of the laws.” Under the 1870 Act, the laws applied to *all persons* equally.

Unsurprisingly, there was debate in Congress about whether the law would grant aliens the right to own real estate:

Mr. POMEROY. I have not examined this bill, and I desire to ask the Senator from Nevada a question. I understood him to say that this bill gave the same civil rights to all persons in the United States which are enjoyed by citizens of the United States. Is that it?

Mr. STEWART. No; it gives all the protection of the laws. If the Senator will examine this bill in connection with the original civil rights bill, he will see that it has no reference to inheriting or holding real estate.

Mr. POMEROY. That is what I was coming to.

Mr. STEWART. The civil rights bill had several other things applying to citizens of the United States. This simply extends to foreigners, not citizens, the protection of our laws where the State laws deny them the equal civil rights enumerated in the first section.

Mr. POMEROY. They have the same civil rights in that regard. Does the property of a foreigner dying here descend under our laws? Most of the States appoint a public administrator who administers upon the estates of foreigners differently from what he does on the estates of citizens. Does this interfere with that?

Mr. STEWART. I think not.

Mr. POMEROY. Foreigners are not allowed to petition the Senate. If the bill passes, will the petitions of foreigners be received here?

Mr. STEWART. . . .

239. *Id.* (emphasis added).

240. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 115.

...

It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and property here. The civil rights bill, then, will give the United States courts jurisdiction to enforce it.

Mr. POMEROY. I am undoubtedly in favor of the object of the bill. I wanted to see how far the Senator was willing to go. So far as the bill goes I think it is right; I only question the propriety of not going further myself.²⁴¹

As Senator Stewart explains to Republican Samuel Pomeroy of Kansas, the point of the bill was to ensure that all states were following the Fourteenth Amendment and, specifically, applying it to the aliens in their jurisdictions. He did not want to elevate aliens to the status of citizens or to grant them any more rights than they had under the Fourteenth Amendment; he simply wanted to ensure they were receiving the equal protection that had already been granted to them.

In the House, Republican Aaron Sargent viewed the proposed Civil Rights Act of 1870 in the same manner. He explained during the House's debate on the bill, "I believe, and I have contended for years in my own State, that by natural equity, by common justice, the Chinaman and any one else, no matter what his color, is entitled to the equal protection of our laws in life, liberty, and security."²⁴² But, Representative Sargent continued, "I never have believed that we should go beyond that and make them all citizens."²⁴³

This opinion—that aliens deserved some basic rights and fair treatment, but were not to be considered citizens—was held not only by members of Congress, but also the public. For example, in 1868 in California, there was widespread editorial opposition to the abridgement of rights and unfair taxes levied directed at the Chinese.²⁴⁴ When the California State Senate voted to repeal a bill barring Chinese aliens from testifying in U.S. courts in criminal cases, the *Daily Alta California* "expressed the hope that a bill to permit

241. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

242. *Id.* at 4275.

243. *Id.*

244. See McClain, *supra* note 227, at 560–61.

testimony in civil cases would soon follow.”²⁴⁵ Even earlier, in 1857, when the ban on Chinese testimony was upheld—after the state

245. *Id.* at 561 (citing Editorial Notes, DAILY ALTA CAL., Jan. 24, 1868, at 2). Editorials written in support of aliens were not just penned in California. Americans across the country supported noncitizens. For example, during the Civil War, a bill was proposed to grant naturalization to aliens who fought in the conflict, and this was met with support from citizens. Dwight Foster, Attorney General of Massachusetts, wrote in October 1864:

Gentleman: In reply to your inquiry as to the law of Congress in regard to the naturalization of aliens who have been honorably discharged from the service of the United States, the following is the only act of Congress on the subject known to me, viz:—

“Sec. 21. *And it be further enacted*, That any alien of the age of twenty-one years and upwards who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honorably discharged, may be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intentions to become a citizen of the United States, and that he shall not be required to prove more than one year’s residence within the United States previous to his application to become such citizen; and that the Court admitting such alien shall, in addition to each proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honorably discharged from the service of the United States as aforesaid.”—[Acts of xxxvii Congress, Sess. II., Chap 200.

By its terms you will see that regular naturalization continues to be indispensable, but an honorably discharged alien soldier is entitled to be naturalized upon proof of one year’s residence in the United States previous to the petition for naturalization.

Dwight Foster, *Naturalization of Aliens*, BOS. DAILY ADVERTISER, Oct. 14, 1864, at 2.

Citizens of the United States agreed with this law and recognized that the noncitizens fighting in a conflict as domestic as the Civil War deserved to become naturalized and gain the rights granted to American citizens. Support can also be seen in the Wisconsin State Register. For the benefit of its alien population and to express its endorsement of the law, the newspaper reported Congress’s consideration of the law under the heading “Important to Aliens,” saying:

A bill to permit aliens who have served one year in the army to become citizens of the United States, being under consideration in the Senate, an amendment was offered that no aliens who had resided in the United States five years previous to the 19th April, 1861, should be naturalized under the laws of the United States after April 1st, 1865. *This is manifestly just and proper, and we hope to see it become a law.*

Important to Aliens, WIS. ST. REG., Jan. 14, 1865, at 2 (emphasis added).

Turning our focus back to California, an editorial written after the Civil War in 1866 addressed the distinction between an alien’s political and personal rights in the state of California. The *Daily Evening Bulletin* of San Francisco delivered a sentiment that many Americans echoed at the time of Fourteenth Amendment ratification: that aliens should be granted the “personal rights” of citizens so long as “political rights,” such as running for office or voting, are reserved for citizens of the United States. The editorial is framed within the question of rights granted to black citizens, but addresses the rights of aliens:

We had occasion lately, in referring to a recent decision of one of the Courts of the State of Nevada, by which a negro was excluded from sitting on a Jury, to discuss the distinction between personal and political rights, and to remark that the Civil

legislature defeated a bill that would have reversed the decision of *People v. Hall*²⁴⁶—the *Daily Evening Bulletin* said, “We regret this action, based as it is entirely upon prejudice, and can only express our conviction that the period will ultimately arrive when it will be clear to all that the law as it stands is mischievous and prejudicial in the highest degree to the public interests.”²⁴⁷ Certain members of the

Rights bill, which had recently become a law, was intended to secure, and on its face purported to secure, only the personal rights of freedmen, such as the right of locomotion, of property, of marriage, and the like, but did not extend to or pretend to confer or regulate political rights, such as the right of suffrage and its kindred rights.

The Supreme Court of this State has just made a decision upon a subject wholly germane to that discussion, and which is based upon the same distinction. By Article I, section 17 of the Constitution of California, it is provided that “Foreigners who are, or may hereafter become *bona fide* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native born citizens.” Here certain personal rights are expressly guaranteed to aliens. But as to political rights, such as the right to hold office, the Supreme Court, in the recent case of *Walther vs. Rabholt*, hold that aliens have no such political rights. Judge Sawyer, delivering the opinion of the Court in that case, says:

[“]It may be said, generally, that the right to vote and of eligibility to office are political and correlative rights. At common law an alien had no recognized political rights. He was permitted to enjoy certain civil rights, but even these were hedged in by many restrictions and limitations. * * * Neither a denizen at common law nor a naturalized citizen under the statutory law of England can hold office. *A juritori* an alien cannot. And such we understand to be the common law in other states where not in any respect modified by constitutional or statutory provisions. And such we also understand the law to be with reference to *political rights* in all civilized countries. We know of no constitutional or statutory modification of the common law in this State as to the *political rights* of aliens.[”]

This is so strongly and clearly expressed as to preclude any further confusion regarding the distinction between personal and political rights; and it will be generally conceded that a negro may be protected in his life and property without necessarily becoming a voter, as it has already come to be admitted that one may assist in the abolition of slavery, and yet not thereby bind himself to marry his daughter to a negro.

Personal and Political Rights of Aliens, DAILY EVENING BULL., Aug. 1, 1866, at 2 (internal citations omitted).

246. 4 Cal. 399 (1854). In brief: George W. Hall and two other men were convicted by the grand jury of Nevada County for the murder of one Ling Sing. Three Chinese and one Caucasian witness testified on the state’s behalf; however, Hall’s counsel appealed on the ground that the Chinese testimony was not valid. The Chief Justice of the California Supreme Court, Hugh C. Murray, reversed the guilty ruling, holding that Chinese testimony had been improperly received because of a California criminal statute which said that “[n]o black or Mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person.” *Id.* at 399.

247. *Admissibility of Chinese and Negro Testimony*, DAILY EVENING BULL., Apr. 10, 1857, at 2.

Californian public seemed to realize, more so than congressmen or state legislators, that the Chinese aliens deserved to be treated fairly.

After 1870, the equal-protection-means-equal-benefits line of thinking and the concept of basic rights for aliens became standard practice. Evidence of this trend can be seen in the cases discussed in Part III and can also be found in congressional records from the late 1800s. For example, when debating the Civil Rights Act of 1875, Republican Senator Oliver Morton of Indiana offered up his interpretation of the Fourteenth Amendment:

[T]he question arises upon this clause of the fourteenth amendment as to what the power of Congress is in regard to the substantial rights and equality of people in the States. The conclusion of this section reads thus:

“Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

I desire to inquire what is meant by “the equal protection of the laws” which a State shall not deprive any person of? To what does the word “protection” refer? Does it mean that the State shall not deprive a man of the equal protection of the law for his person? Will any one contend that it shall have a construction so narrow as that? Will it be contended that it means that a State shall not deprive a person of the equal protection of the law for his property; that it shall be confined to that? I submit that when it declares that no State shall deprive any person of the equal protection of the laws, it means substantially that no person shall be deprived by a State of the equal benefit of the laws; that the word “protection,” as there used, means not simply the protection of the person from violence, the protection of his property from destruction, but it is substantially in the sense of the equal benefit of the law; that it is intended to promote equality in the States, and it refers to the laws of the States.²⁴⁸

Aliens are not made citizens under the Fourteenth Amendment, nor are they granted the “privileges or immunities” that citizens receive. However, the second clause of section 1 does apply to them, giving them equal protection of the laws, as Senator Morton explained above. In the late 1860s, Congress realized that various taxes and other measures were being levied specifically against aliens across the United States (and especially in California), and newspapers began to

248. CONG. GLOBE, 42d Cong., 2d Sess. 846–47 (1872).

speak out against the discriminatory measures. Congress recognized that the states were not following the text of the Fourteenth Amendment and instead were applying the laws unequally to their inhabitants; Congress also recognized that there was popular support for a more fair treatment of aliens. As such, the Civil Rights Act of 1870 was written specifically to protect aliens from taxes and other measures that Congress thought in 1870 violated the Fourteenth Amendment. Finally, after the passage of the Fourteenth Amendment and then the 1870 Act, the idea of basic civil rights for aliens was a constitutional concept.

F. Public Education: A Right, Not a Privilege

1. Public education in Texas in 1869

Critics might counter that a public education is not necessarily a right or that it does not fall under the broad categories of due process and equal protection. However, while the Federal Constitution is silent on the issue of education, many state constitutions during the Reconstruction period did indeed have education clauses. In fact, in 1868, the constitutions of twenty-eight out of the thirty-seven states in the Union had “mandatory language which made the establishment of free public schools open to all students obligatory.”²⁴⁹ The states that provided this access to public education were Alabama,²⁵⁰ Arkansas,²⁵¹ California,²⁵² Delaware,²⁵³ Florida,²⁵⁴ Georgia,²⁵⁵

249. Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 451.

250. ALA. CONST. of 1867, art. XI, § 6, *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 95 (William F. Swindler ed., 1973) [hereinafter SOURCES AND DOCUMENTS].

251. ARK. CONST. of 1868, art. IX, § 1, *reprinted in* ARK. CODE ANN. CONSTITUTIONS 663 (2004).

252. CAL. CONST. of 1849 art. IX, § 3, *reprinted in* 1 SOURCES AND DOCUMENTS, *supra* note 250, at 456.

253. DEL. CONST. of 1831, art. VII, § 11, *reprinted in* 1 DEL. CODE ANN. 302 (2007).

254. FLA. CONST. of 1868, art. IX, §§ 1–2, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 250, at 361–62.

255. GA. CONST. of 1868, art. VI, § 1, *reprinted in* 2 SOURCES AND DOCUMENTS, *supra* note 250, at 509.

Indiana,²⁵⁶ Kansas,²⁵⁷ Louisiana,²⁵⁸ Maine,²⁵⁹ Maryland,²⁶⁰
Massachusetts,²⁶¹ Michigan,²⁶² Minnesota,²⁶³ Mississippi,²⁶⁴ Missouri,²⁶⁵
Nevada,²⁶⁶ New York,²⁶⁷ North Carolina,²⁶⁸ Ohio,²⁶⁹ Oregon,²⁷⁰

256. IND. CONST. of 1851, art. VIII, § 1, *reprinted in* 3 SOURCES AND DOCUMENTS, *supra* note 250, at 387.

257. KAN. CONST. of 1859, art. VI, §§ 2–3, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 250, at 90.

258. LA. CONST. of 1868, tit. VII, art. 135, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 250, at 158.

259. ME. CONST. of 1819, art. VIII, *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 250, at 323.

260. MD. CONST. art. VIII, § 1 (enacted in 1867), *reprinted in* 4 SOURCES AND DOCUMENTS, *supra* note 250, at 472.

261. MASS. CONST. ch. V, § 2 (enacted in 1780), *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 250, at 106.

262. MICH. CONST. of 1850, art. XIII, § 4, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 250, at 234.

263. MINN. CONST. of 1857, art. VIII, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 250, at 311.

264. MISS. CONST. of 1868, art. VIII, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 250, at 385.

265. MO. CONST. of 1865, art. IX, § 1, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 250, at 531.

266. NEV. CONST. of 1864, art. XI, § 2, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 250, at 275.

267. N.Y. CONST. of 1846, art. IX, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 250, at 205.

268. N.C. CONST. of 1868, art. IX, § 2, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 250, at 427.

269. OHIO CONST. of 1851, art. VI, § 2, *reprinted in* 7 SOURCES AND DOCUMENTS, *supra* note 250, at 566.

270. OR. CONST. art. VIII, § 3 (enacted in 1857), *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 250, at 215.

Pennsylvania,²⁷¹ Rhode Island,²⁷² South Carolina,²⁷³ Texas,²⁷⁴ Vermont,²⁷⁵ West Virginia,²⁷⁶ and Wisconsin.²⁷⁷

Most importantly for our argument as to *Plyler v. Doe*, the Texas state constitution in effect in 1869, right after the ratification of the Fourteenth Amendment, *did* include a provision about education. Article IX of the 1869 Texas Constitution discusses all details regarding education, and section 1 of article IX establishes public schools throughout the state, saying: “It shall be the duty of the Legislature of this State, to make suitable provisions for the support and maintenance of a system of Public Free Schools, for the gratuitous instruction of *all the inhabitants* of this State, between the ages of six and eighteen years.”²⁷⁸ Texas could have chosen to say “for the gratuitous instruction of *all the citizens of Texas*,” but it instead used the phrase “*all of the inhabitants of this State*,” which, as we have shown, was understood to include both citizens and aliens at the time. Granted, by 1876, the constitution did stipulate that schools must be segregated, saying, “Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both,”²⁷⁹ but nowhere does article IX address aliens.

Thus, one year after the ratification of the Fourteenth Amendment, which gave equal protection and due process of the laws to aliens, Texas guaranteed a free public school education to both citizens and aliens, as indicated by the phrase “gratuitous instruction of all the inhabitants of this State” in article IX, section 1 of its constitution. “Gratuitous” here means “free,” not “unnecessary,” as

271. PA. CONST. of 1838, art. VII, § 1, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 250, at 302.

272. R.I. CONST. of 1842, art. XII, § 1, *reprinted in* 8 SOURCES AND DOCUMENTS, *supra* note 250, at 395.

273. S.C. CONST. of 1868, art. X, § 3, *reprinted in* 2 AMERICAN CONSTITUTIONS 302 (Franklin B. Hough ed., 1872).

274. TEX. CONST. of 1868, art. IX, § 4, *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 250, at 310 (ratified in 1869).

275. VT. CONST. ch. II, § 41 (enacted in 1793), *reprinted in* 9 SOURCES AND DOCUMENTS, *supra* note 250, at 514.

276. W. VA. CONST. of 1861, art. X, § 2, *reprinted in* 10 SOURCES AND DOCUMENTS, *supra* note 250, at 358.

277. WIS. CONST. art. X, § 3 (enacted in 1848), *reprinted in* 10 SOURCES AND DOCUMENTS, *supra* note 250, at 392.

278. TEX. CONST. of 1869, art. IX, § 1 (emphasis added).

279. TEX. CONST. of 1876, art. VII, § 7.

we understand the word to mean today. Webster defines it as “1. Free; voluntary; not required by justice; granted without claim or merit. . . . 2. Asserted or taken without proof”²⁸⁰ Similarly, “gratuity” at the time was defined as “1. A free gift; a present; a donation; that which is given without a compensation or equivalent. 2. Something given in return for a favor; an acknowledgement.”²⁸¹

At the time, Texas may not have been aware that it was allowing the free education of aliens, or there may not have been as large an alien community as there is today; however, by using the word “inhabitants” instead of “citizens,” it included aliens in its public education system whether it wanted to or not. This fact makes it difficult for anyone who knows the history detailed above to accept the law under review in *Plyler*. Why, in 1975, did the Texas legislature find it necessary to change something that had been a part of its constitution for *one hundred years*?²⁸² Was the influx of illegal aliens

280. WEBSTER, 1848 DICTIONARY, *supra* note 34, at 517.

281. *Id.*

282. Once enacted, Financing of Public School Education, ch. 334, 1975 Tex. Gen. Laws 896 (amending TEX. EDUC. CODE ANN. § 21.031 (West 1972)) read:

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian, or person having lawful control resides within the school district.

TEX. EDUC. CODE ANN. § 21.031 (West 1975).

The specific changes that the 1975 amendment brought on were: In subsection (a), the phrase “who are citizens of the United States or legally admitted aliens and who are” was substituted for “without regard to color” and the ages “five” and “21” were substituted for the ages “six” and “18.”

In subsection (b), the phrase “who is a citizen of the United States or a legally admitted alien and who is” was inserted, the age “five” was substituted for the age “six,” and the phrase “notwithstanding the fact that he may have been enumerated in the scholastic census of a different district or may have attended school elsewhere for a part of the year” was deleted. In subsection (c), the phrase “who are either citizens of the United states or legally admitted aliens who are” was inserted and the age “five” was substituted for the age “six.”

and their children so great that, suddenly, after one hundred years of allowing alien children a free public education, the strain was too much on the school system? The Reconstruction era was not a particularly flattering one for the South, race-wise; why, in 1868, were aliens included in public schooling but in 1975, a purportedly more accepting time, alien children became a concern?

2. *Plyler v. Doe oral argument*

These questions were addressed, albeit in a roundabout manner, during oral argument for *Plyler*. Richard L. Arnett, arguing on behalf of Texas, claimed the statute was justified because the influx of nonresident children put a significant burden on the state's public school system:

When one considers the fact that Mexico's population is doubling approximately every twenty years, and that approximately four and a half million children of school age are out of school in Mexico right now because of [a] lack of adequate facilities, it doesn't take a great deal of imagination to understand the Texas legislature's concerns for the future.²⁸³

He continued, "The purpose of this statute is to protect the Mexican American population's education in Texas," explaining that "a district on the border [between Texas and Mexico], Eagle Pass, which has a ninety-five percent Mexican American population, decided to enact a policy precluding illegal aliens from admission into their schools."²⁸⁴

According to Mr. Arnett, the districts of Eagle Pass, Brownsville, and other "Valley districts" supported section 21.031 because "they have also suffered a seven-hundred-percent increase in the last year in

It can be clearly seen from these changes that the 1975 amendment was focused on targeting the children of illegal aliens: before the 1975 changes, no mention at all was made of citizenship or alienage. One wonders why the change was brought upon so suddenly in 1975—perhaps there was a large influx of illegal aliens? There may have also been monetary motivations, considering that the public schools' no-cost nature is emphasized, and it is highly probable that many illegal aliens were not paying taxes that helped to keep the public schools "free of tuition." The current version, TEX. EDUC. CODE ANN. § 25.001 (West 2011), makes no mention of aliens.

283. Oral Argument at 1:20, *Plyler v. Doe*, 457 U.S. 202 (1982) (No. 80-1538), <https://www.oyez.org/cases/1981/80-1538>.

284. *Id.* at 5:39.

illegal alien enrollment.”²⁸⁵ He also contended, “The one interest that Texas asserts here which we have predictably met with opposition on as to whether that is permissible is that as a subsidiary to protecting our resources, we would like to reduce the incentive for illegal immigration, particularly of families and of school-aged children.”²⁸⁶

The Justices seemed to fault this logic, though, cornering Mr. Arnett with statements such as “there can’t be any question, can there, that an alien, documented or undocumented, brought before a criminal court is entitled to the same due process as any other person in the United States?”²⁸⁷ And

does that mean that you assume . . . that these [noncitizen, “illegal alien”] children will remain in the school district because it is just too much of an administrative burden to get them deported, so they are going to be part of the community anyway, and you would rather have them uneducated than educated?²⁸⁸

The Justices did not consider the “strain on Texas resources” argument to be a satisfactory justification for Texas’s discrimination against the children of noncitizens.

The other advocate for the appellants, John C. Hardy, argued that Texas was correct in denying noncitizen children the right to a public education because of their status as nonresidents of Texas. His argument—if the noncitizen children “do not have legal resident status or domiciliary status legally . . . they cannot attain the resident status . . . allowing them to attend school free of charge”—hinged on “the classification in the [Texas] statute.”²⁸⁹ “It is not alienage or citizenship,” he claimed. “It is between a legal resident and a non-legal resident, or a residency statute and a non-residency statute.”²⁹⁰

Hardy then tried to explain that the Texas law “provides that non-resident citizens and non-resident aliens are both required to pay tuition.”²⁹¹ He made the equivalence that, because “the Court has continuously held . . . that in higher education branches . . . a non-

285. *Id.* at 6:30.

286. *Id.* at 13:12.

287. *Id.* at 4:50.

288. *Id.* at 16:00.

289. *Id.* at 24:11.

290. *Id.* at 24:35.

291. *Id.* at 24:47.

resident of the state can be charged a different tuition than a resident of the state,”²⁹² they should uphold that same principle for primary-school education.

The Justices, however, were quick to refute this argument, pointing out that “before the statute was passed, [the state of Texas] received federal funds based in part on the enrollment which included illegal, undocumented children.”²⁹³ Therefore, it would be “pretty hard” for Mr. Hardy to argue “that the federal government has some rule” barring alien children from attending public schools “when it actually paid” the state of Texas federal funding based, in part, on the enrollment of said “illegal, undocumented children.”²⁹⁴

The Justices followed this line of questioning by asking whether the state of Texas could “deny [the noncitizen children] fire protection,”²⁹⁵ to which Mr. Hardy responded, “I think that they are afforded all the due process procedures and the other problems that are attributable to that. We are not talking about denying them all rights. I am talking and attempting to talk about the resident and non-resident,”²⁹⁶ at which point he was interrupted. The interruption came from a Justice contending that “you are talking about denying them all rights that every other similarly situated person has, such as fire protection, police protection, garbage collection, things like that. You could take all those things away, it seems to me, under the state’s argument.”²⁹⁷ As demonstrated by the pointed comments from the Justices, both advocates for the appellants in *Plyler v. Doe* struggled to provide truly valid reasons for section 21.031.

Advocates for the appellees endeavored to point out the flaws in the appellants’ logic; for example, Peter Schey raised the fact that “the state of Texas seems to argue that it is in a highly unique situation and they downplay the importance of this problem to states like California, et cetera.”²⁹⁸ As Mr. Schey argued, Texas was not the only state facing a large influx of noncitizen immigration, therefore its argument that

292. *Id.* at 25:12.

293. *Id.* at 26:56.

294. *Id.* at 27:22.

295. *Id.* at 29:06.

296. *Id.* at 30:03.

297. *Id.* at 30:20.

298. *Id.* at 39:12.

section 21.031 of title II was created to help preserve resources and stop schools' population from increasing was not a valid one.

The appellees' other advocate, Peter Roos, used an approach similar to the one we take in this Article to demonstrate why section 21.031 was unconstitutional. He explained that the Equal Protection Clause "is to be contrasted historically with the clause that . . . grants privileges and immunities to citizens."²⁹⁹ He continued by saying that the Court has said the Equal Protection Clause "include[s] undocumented persons, because they are indeed persons."³⁰⁰ He then, as we have in this Article, set forth a legislative history of the Fourteenth Amendment, arguing, "The primary framers of the Fourteenth Amendment clearly thought of, at least in terms of coverage, of the Due Process Clause and the Equal Protection Clause as protecting the same group of people."³⁰¹

Mr. Roos also argued that, based on the language of the Equal Protection Clause and the legislative history of the Fourteenth Amendment, "*absent* the right of coverage under the Equal Protection Clause, the state could . . . treat undocumented people arbitrarily and irrationally."³⁰² He then posed a question that we, too, have considered: "What would be the limitations upon a state should there not be the minimal protection of the Equal Protection Clause?"³⁰³ Mr. Roos's bold statement drives home the message that we have sought to convey throughout this Article: the Texas statute barring the children of illegal aliens from attending public school was unconstitutional due to the original framing, conception, and application of the Equal Protection Clause.

Texas could not have made any claim during the oral arguments for *Plyler vs. Doe* that would have proved the 1975 regulation constitutional. The original language of the Texas Constitution does

299. *Id.* at 1:06:38.

300. *Id.* at 1:06:57.

301. *Id.* at 1:07:26. He even mentions Representative Bingham and Senator Howard: "In our brief, we cite to Representative Bingham, who was commonly acknowledged to be the author of Section 1 of the Fourteenth Amendment, and he spoke of the due process and equal protection clauses alike as protecting the citizen and the stranger." *Id.* at 1:07:40.

Likewise, on the floor of the Senate, the floor manager was Senator Howard, and Senator Howard spoke of the two clauses in terms of coverage in the same words, and spoke of them together, and when he spoke of them, he spoke of them as protecting whomever should be within the country.

Id. at 1:08:32.

302. *Id.* at 1:08:55 (emphasis added).

303. *Id.* at 1:09:17.

not exclude alien children from the state's public school system, and in fact covers mainly funding and land usage, except when stipulating that segregation is necessary. Of course, article VII had been amended since 1876; however, none of those amendments mention alienage. Nowhere in article VII are the children of illegal aliens discussed, and certainly nowhere in article VII are they barred from attending public schools in Texas. The Fourteenth Amendment of the United States Constitution, *the highest law of the land*, provides "persons," i.e., aliens and citizens alike, with due process and equal protection of the laws. Therefore, the 1975 statute violates the Fourteenth Amendment—alien children are "protected" under the Texas Constitution, which does not explicitly, or even implicitly, ban alien children from attending public schools.

IV. OTHER FOURTEENTH AMENDMENT ALIENAGE CASES

The preceding Parts establish a new, originalist public meaning reading of the Fourteenth Amendment's Equal Protection Clause and have explained how the Equal Protection Clause applies to aliens, both legal and illegal, within the United States. We now apply this scholarship to other alienage cases in which the Fourteenth Amendment was the basis for the decision. The relevant cases³⁰⁴ are as follows: *Yick Wo v. Hopkins*,³⁰⁵ *Truax v. Raich*,³⁰⁶ *Takahashi v. Fish &*

304. Scholars of immigration and/or alienage case law will notice that a seminal alienage case, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), is missing from our discussion. Under the Chinese Exclusion Act of 1882, Chinese noncitizens were required to obtain a certificate of residence to continue living in the United States, so when the plaintiff, Fong Yue Ting, did not have this certificate, he was arrested. A judge ordered that he be deported immediately, so he appealed the decision. Ultimately, the Supreme Court (split 6–3) decided that the national government had an "absolute and unqualified" right to oversee the immigration process, including deportation of immigrants already living in the United States. The dissent stated that, while Congress does have the authority to create new immigration requirements, the Due Process Clause of the Fifth Amendment applies to *any person* residing in the country, and immigrants should be allowed to challenge a deportation order. We disagree with the decision in *Fong Yue Ting* and believe the dissent to be the better part of the argument. As such, we did not want to include this case in our discussion of alienage cases that would be better served through an originalist reading of the Fourteenth Amendment. See NEUMAN, *supra* note 173, at 62, 120–21.

305. 118 U.S. 356 (1886) (whether Chinese immigrants could operate laundry businesses in California).

306. 239 U.S. 33 (1915) (whether Arizona could bar aliens from employment).

Game Commission,³⁰⁷ *Graham v. Richardson*,³⁰⁸ *Hampton v. Mow Sun Wong*,³⁰⁹ *Nyquist v. Mauclet*,³¹⁰ and *Arizona v. United States*.³¹¹

We agree with the outcome of these decisions but believe the reasoning of each would have been stronger if articulated using our originalist equal protection reading that aliens fall under the category of “any person” (according to the 1848 Webster’s Dictionary definition of the words “any” and “person”) and have a constitutional right to the equal protection of the law and to due process of law.

We will briefly outline each case and explain how our reading better suits the circumstances. In most of these cases, the aliens serving as petitioners are “legal aliens” as opposed to *Plyler v. Doe*’s illegal aliens. However, as explained in Part II, when the Fourteenth Amendment was written, there was no federal concept of legal alienage versus illegal alienage. Therefore, we believe that, for our argument, the distinction of “legal” versus “illegal” does not matter. We are not arguing that the rights that emerged from the following cases should be conferred upon illegal aliens; we are simply pointing out that each case could benefit from the application of originalism.

A. *Yick Wo v. Hopkins*

The earliest case to come before the Supreme Court that dealt explicitly with alien rights was *Yick Wo v. Hopkins*, decided in 1886. Yick Wo, a Chinese man living in California, petitioned the Supreme Court of California for a writ of habeas corpus after being wrongfully imprisoned in San Francisco for violating ordinances.³¹² The ordinance in question established that no person could operate a laundry in a wooden building without a permit from the Board of Supervisors, but the Board granted no permits to any Chinese person who applied

307. 334 U.S. 410 (1948) (whether California could deny fishing licenses to individuals who are ineligible to U.S. citizenship).

308. 403 U.S. 365 (1971) (whether Arizona could deny welfare benefits to aliens who had not lived in the state for a certain number of years and Pennsylvania could deny welfare benefits to any aliens).

309. 426 U.S. 88 (1976) (whether the Federal Civil Service Commission could bar aliens from working for the Federal Civil Service).

310. 432 U.S. 1 (1977) (whether New York could require that resident aliens apply for U.S. citizenship before becoming eligible for education-based financial aid).

311. 132 S. Ct. 2492 (2012) (whether four different provisions of an Arizona state law were preempted by federal immigration law).

312. *Yick Wo v. Hopkins*, 118 U.S. 356, 356–57 (1886).

while simultaneously denying permits to only one of eighty non-Chinese applicants.³¹³ Yick Wo was imprisoned for refusing to pay a ten-dollar fine, which he incurred for continuing to operate his business without a permit.³¹⁴ The Supreme Court did not deal with the writ but instead answered the question of whether the statute was discriminatory.³¹⁵ The Court concluded that the statute violated the Equal Protection Clause and struck it down as unconstitutional.³¹⁶

Interestingly, the argument that Justice T. Stanley Matthews used in his opinion, written for a unanimous Court, is quite similar to our originalist approach (due probably to the fact that *Carolene Products* would not be decided for another fifty years). He explained:

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of

313. *Id.* at 359–60.

314. *Id.* at 357.

315. *Id.* at 366–68.

316. *Id.* at 374.

the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.³¹⁷

Justice Matthews recognized in 1886, only twenty years after the Fourteenth Amendment's inception, what we are trying to emphasize 130 years later—the “any person” language of the Equal Protection Clause applies to literally any being living within the borders of the United States. He and his colleagues on the Court understood³¹⁸ that the Equal Protection Clause could safeguard aliens as well as citizens from the inherently racist and anti-alien sentiment behind the California statute. The Court struck the statute down on originalist grounds—confirming that the phrase “any person” includes aliens, not just “citizens”—and set a precedent for using the Fourteenth Amendment to defend alien rights.

B. Truax v. Raich

The next major immigration case we address is *Truax v. Raich*,³¹⁹ a 1915 case examining whether a state could bar aliens from employment. The state of Arizona passed a law in 1914 that stated:

Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one time, in the State of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty

317. *Id.* at 368–69.

318. As can be seen near the end of the majority opinion:

No reason whatever, except the will of the supervisors, is assigned why [the Chinese laundry owners] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.

Id. at 374.

319. 239 U.S. 33 (1915).

(80) percent qualified electors or native-born citizens of the United States or some subdivision thereof.³²⁰

Mike Raich, an Austrian immigrant whom the Supreme Court described as “an inhabitant of the State of Arizona but not a qualified elector,”³²¹ was fired from his job as a cook by his employer, William Truax, after the Arizona law was passed. Prior to the passage of the law, Raich had worked for Truax without problem, but after the law’s enactment, Truax informed Raich that he would be fired “by reason of [the law’s] requirements and because of the fear of the penalties that would be incurred in case of its violation.”³²² The issue was “whether the act assailed [was] repugnant to the Fourteenth Amendment,”³²³ and the Supreme Court ruled that it was.

Justice Charles Evans Hughes, writing for an eight-Justice majority, penned the opinion of the Court. He explained:

Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union. Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—“any person within its jurisdiction”—as it has frequently been held, includes aliens.³²⁴

Justice Hughes then cited *Yick Wo*, discussed above, to prove that the Fourteenth Amendment is applicable to aliens. He framed his argument using the Fourteenth Amendment and explained that Arizona could not use “within its jurisdiction” philosophy to justify its discrimination against immigrants:

It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State

320. *Id.* at 35.

321. *Id.* at 36.

322. *Id.*

323. *Id.* at 39.

324. *Id.* (internal citation omitted).

to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.³²⁵

Moving away from the Fourteenth Amendment, Justice Hughes stated, “The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.”³²⁶ Since aliens “cannot live where they cannot work,”³²⁷ “[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode”³²⁸ To synthesize the various parts of this argument, Justice Hughes held that the Arizona statute was unconstitutional because: a) under the Fourteenth Amendment, Arizona had to provide for the welfare of *any persons* within its jurisdiction because the Fourteenth Amendment was applicable to aliens following the decision in *Yick Wo*; and b) by denying legal aliens the opportunity to work, Arizona was inherently denying them the ability to live in the state and was therefore usurping the federal government’s authority to “admit or exclude aliens.”³²⁹

While this reading of the Fourteenth Amendment is in line with our originalist interpretation of the Equal Protection Clause, there is one major difference between our understanding of the clause and Justice Hughes’s reasoning: Mike Raich was a *legal* immigrant in the United States, and as such, the opinion was written to reflect the fact that Arizona could not bar *legal aliens* from finding work in the state. Justice Hughes’s opinion, which protects *legal aliens* under the Equal Protection Clause, differs from our interpretation of the Equal Protection Clause because, as we have discussed throughout this Article, we believe the Equal Protection Clause protects *all aliens* in this country regardless of their “legal immigration” status.³³⁰

Justice James Clark McReynolds was the lone dissenter—he believed that under the Eleventh Amendment the Supreme Court had no right to rule in *Truax*.³³¹ However, that dissent has no bearing on

325. *Id.* at 41.

326. *Id.* at 42.

327. *Id.*

328. *Id.*

329. *Id.* at 34.

330. See discussion *supra* Section II.E.

331. Justice McReynolds was so firm in his belief that his dissent was only one paragraph. He argued that federal courts cannot get involved if a citizen or noncitizen sues a state as a whole

whether Arizona's anti-immigrant employment law was in violation of the Equal Protection Clause. As Justice Hughes and his majority brethren explained, Arizona's refusal to allow immigrants to live within its jurisdiction was both a violation of the Fourteenth Amendment *and* a usurpation of the federal government's authority over the admittance of aliens.

C. *Takahashi v. Fish & Game Commission*

Next on our timeline comes *Takahashi v. Fish & Game Commission*, a California case decided thirty-five years after *Truax*. The Court decided the case in 1948—after *Carolene Products* had been penned—but used equal-protection logic similar to our own. Torao Takahashi came to the United States from Japan, became a resident of California in 1907, and used commercial fishing licenses issued by the state to fish for profit.³³² In 1943, during World War II and a period of intense anti-Japanese sentiment, The California State Legislature adopted section 990 of the California Fish and Game Code to prohibit the issuance of licenses to the “alien Japanese.”³³³ When Takahashi applied for a license in 1945, he was denied.

The statute was applied unfairly to deliberately harm aliens, violating the Equal Protection Clause. Justice Hugo Black delivered the majority opinion and explained, in essence, that aliens fall under the concept of *any person*, the argument that we have made throughout this Article. He stated:

It does not follow, as California seems to argue, that because the United States regulates immigration and naturalization in part on the basis of race and color classifications, a state can adopt one or more of the same classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.³³⁴

entity and decided that Mike Raich had brought suit against Arizona as a whole by questioning the constitutionality of its law. However, Mike Raich brought suit against his employer, William Truax, Sr., and not the state of Arizona as a whole; as such, the Eleventh Amendment was inapposite and Justice McReynolds's dissent did not hold any water. Arizona's anti-immigrant employment law was clearly in violation of the Equal Protection Clause.

332. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 412–13 (1948).

333. *Id.* at 413.

334. *Id.* at 418–19.

Justice Black pointed out that “the Federal Government has broad constitutional powers in determining” immigration processes, and that “Congress, in the enactment of a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization, has broadly provided”³³⁵ that “[a]ll *persons within the jurisdictions* of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens”³³⁶ He continued that the congressional statute—and its framing document, the Equal Protection Clause—is meant to protect both aliens and citizens:

The protection of this section has been held to extend to aliens as well as to citizens. Consequently the section and the Fourteenth Amendment on which it rests in part protect “all persons” against state legislation bearing unequally upon them either because of alienage or color. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide “in any state” on an equality of legal privileges with all citizens under non-discriminatory laws.³³⁷

According to Justice Black, California had to grant a fishing permit to Takahashi because, under the Fourteenth Amendment’s “any person” language, the law barring him from receiving a permit failed to equally grant permits to non-aliens and aliens who were legally within California’s borders.³³⁸ Under the Fourteenth Amendment, the laws must apply equally to all people, so the California Fish and Game Commission’s statute barring *only* Japanese individuals from obtaining a fishing permit was unconstitutional.

Aside from Justice Black’s majority opinion, Justice Frank Murphy wrote a concurrence. Justice Murphy wrote of his concern that “§ 990 of the California Fish and Game Code, barring those ineligible to citizenship from securing commercial fishing licenses, *is the direct outgrowth of antagonism toward persons of Japanese ancestry.*”³³⁹ Murphy argued that “[t]he statute in question is but one more manifestation of the anti-Japanese fever which has been evident in

335. *Id.* at 419.

336. *Id.* (quoting 8 U.S.C. § 41 (1946)).

337. *Id.* at 419–20 (internal citations omitted).

338. Again, we are not discussing, disputing, or trying to reconfigure the concept of “legal” versus “illegal” aliens in this case or any other.

339. *Takahashi*, 334 U.S. at 422 (emphasis added).

California in varying degree since the turn of the century,”³⁴⁰ and that “[n]o pretense was made that this alternation was in the interests of conservation.”³⁴¹

Justice Murphy purported that this racist law was created “to discourage the return to California of Japanese aliens,”³⁴² and he used this race-based examination of section 990 to conclude that “[t]he equal protection clause of the Fourteenth Amendment . . . does not permit a state to discriminate against resident aliens in such a fashion, whether the purpose be to give effect to racial animosity or to protect the competitive interests of other residents.”³⁴³ To Justice Murphy, the racial aspect of section 990 was what violated the Equal Protection Clause as opposed to the “discriminatory against aliens” argument used in Justice Black’s majority opinion.³⁴⁴

Justice Stanley F. Reed wrote a dissent joined by Justice Robert H. Jackson. Justice Reed believed that California’s anti-immigrant fishing law was constitutional for the following reason:

As fishing rights have been treated traditionally as a natural resource, in the absence of federal regulation, California as a sovereign state has power to regulate the taking and handling of fish in the waters bordering its shores. It is, I think, one of the natural resources of the state that may be preserved from exploitation by aliens. The ground for this power in the absence of any exercise of federal authority is California’s authority over its fisheries.

The right to fish is analogous to the right to own land, a privilege which a state may deny to aliens as to land within its borders. It is closely akin to the right to hunt, a privilege from which a state may bar aliens, if reasonably deemed advantageous to its citizens.³⁴⁵

The argument that California has sovereign control over its waters and its fishing practices carries some weight; however, the question in *Takahashi* was not whether California had the constitutional right to regulate the use of its fishing grounds. Rather, the issue was whether Takahashi should have been granted a commercial fishing license and

340. *Id.*

341. *Id.* at 424.

342. *Id.*

343. *Id.* at 425.

344. It is worth noting that Justice Murphy’s conclusion is particularly strong: “We need but unbutton the seemingly innocent words of § 990 to discover beneath them the *very negation of all the ideals of the equal protection clause.*” *Id.* at 427 (emphasis added).

345. *Id.* at 427–28 (internal citations omitted).

therefore whether section 990 of the California Fish and Game Code was unconstitutional. Justice Reed's argument was certainly anti-immigrant in sentiment, but his precedent-based argument regarding a state's ability to provide some rights exclusively for its citizens was not necessarily a fallacious one. Justice Reed's logic was simply inapplicable to the facts.

The purpose of section 990 was to specifically bar *Japanese immigrants* from obtaining commercial fishing licenses. The reasoning for this ban was explained as racism in Justice Murphy's concurrence and anti-immigrant sentiment in Justice Black's opinion. Section 990 was not conferring some special privilege upon all California citizens, as Justice Reed claimed in his dissent; any non-Japanese immigrant could still obtain a commercial fishing license. Had section 990 discriminated against *all immigrants*, *Takahashi* would have been a very different case indeed (though, perhaps, still unconstitutional if viewed through our understanding of the Equal Protection Clause). Instead, the statute only targeted Japanese immigrants, and thus Justice Reed's argument—that California was following the ideology that “[c]itizens have rights superior to those of aliens in the ownership of land and in exploiting natural resources”³⁴⁶—is untenable. The discriminatory statute barring *Takahashi* from obtaining a commercial fishing license was clearly in violation of the Equal Protection Clause because the law did not apply to all persons in California in the same manner.

D. *Graham v. Richardson*

Twenty-three years later, *Graham v. Richardson* dealt with two related anti-alien welfare statutes in Arizona and Pennsylvania.³⁴⁷ In Arizona, aliens could obtain certain welfare benefits only after meeting a fifteen-year residency requirement, while Pennsylvania denied “general assistance” to aliens.³⁴⁸ Carmen Richardson, a legal alien who

346. *Id.* at 429.

347. 403 U.S. 365, 365 (1971).

348. *Id.* at 366–68.

This case, from Pennsylvania, concerns that portion of a general assistance program that is not federally supported. The relevant statute is § 432 (2) of the Pennsylvania Public Welfare Code, Pa. Stat. Ann., Tit. 62, § 432 (2) (1968), originally enacted in 1939. It provides that those eligible for assistance shall be (1) needy persons who qualify under the federally supported categorical assistance programs and (2) those

became disabled while living in Arizona, was denied welfare assistance because she did not meet the residency requirement;³⁴⁹ Elsie Mary Jane Leger was a legal alien from Scotland who had been living in Pennsylvania since 1965 but was denied “public assistance” due to her alien status.³⁵⁰ In a unanimous opinion written by Justice Blackmun, the Court declared the statutes unconstitutional because neither Arizona nor Pennsylvania could establish a rational basis for creating two classes of needy persons—aliens versus citizens.³⁵¹

Although Justice Blackmun’s argument was based in *Carolene Products*’ equal-protection logic, he acknowledged that the “any person” language of the Equal Protection Clause applies to aliens. He stated, “Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. But the Court’s decisions have established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.”³⁵²

Given that “classifications based on alienage” are “subject to close judicial scrutiny,” Justice Blackmun argued, Arizona’s and Pennsylvania’s “restrictions” are, in kind, subject to close judicial scrutiny.³⁵³ The states both sought “to justify their restrictions” on aliens’ eligibility for public assistance “solely on the basis of a State’s ‘special public interest’ in favoring its own citizens over aliens” when distributing “limited resources such as welfare benefits.”³⁵⁴ The Court determined that this reasoning failed the rational basis test.³⁵⁵ Arizona

other needy persons who are citizens of the United States. Assistance to the latter group is funded wholly by the Commonwealth.

Id. at 368.

349. *Id.* at 367.

350. *Id.* at 369.

351. *Id.* at 372–73.

352. *Id.* at 371–72 (internal citations omitted). Justice Blackmun even quotes *Takahashi*, saying, “Accordingly, it was said in *Takahashi*, that ‘the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.’” *Id.* at 372 (internal citation omitted).

353. *Id.*

354. *Id.*

355. Justice Blackmun wrote:

Whatever may be the contemporary vitality of the special public-interest doctrine in other contexts after *Takahashi*, we conclude that a State’s desire to preserve limited welfare benefits for its own citizens is inadequate to justify Pennsylvania’s making

and Pennsylvania could not use their “desire to preserve limited welfare benefits” for their own citizens to justify barring noncitizen residents from accessing those benefits.

This rational-basis argument makes some sense if one understands Supreme Court precedent, but the argument is not defensible because the term “rational basis” is vague. It is difficult to uniformly define what qualifies as a “rational basis” for discrimination, and the argument that “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny”³⁵⁶ means little from a constitutional standpoint. Labeling aliens a “suspect class” is arbitrary and therefore does not indicate anything about their constitutional rights. One justice might believe laws based on alienage worthy of “strict scrutiny,” but another might disagree. With our originalist approach, it is much easier to establish that the original meaning of the Fourteenth Amendment extended to aliens (regardless of “legal” or “illegal” classification) the right to equal protection of the laws and then to apply that principle to specific situations. In the case of *Graham v. Richardson*, the two welfare laws clearly did not protect aliens in the same manner that they protected citizens, and therefore violated the Equal Protection Clause. This originalist argument is much clearer than the rational basis test and follows a set of guidelines that can be applied in the same manner to similar cases.

E. *Hampton v. Mow Sun Wong*

The next case, *Hampton v. Mow Sun Wong*,³⁵⁷ was decided under the Fifth Amendment’s Due Process Clause. However, the Fourteenth Amendment’s Equal Protection Clause was incorporated into the Fifth Amendment’s Due Process Clause in *Bolling v. Sharpe*.³⁵⁸ After

noncitizens ineligible for public assistance, and Arizona’s restricting benefits to citizens and longtime resident aliens.

Id. at 374.

356. *Id.* at 372.

357. 426 U.S. 88 (1976).

358. *Bolling v. Sharpe*, 347 U.S. 497 (1954). *Bolling*, decided in 1954, was a civil rights case that addressed whether segregated public schools in Washington, DC, violated the Due Process Clause of the Fifth Amendment. In *Brown v. Board of Education*, decided the same day as *Bolling*, the Supreme Court held that “the Equal Protection Clause of the Fourteenth Amendment prohibits states from maintaining racially segregated public schools.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954). The Fifth Amendment, though, “does not contain an

Bolling, the Fifth Amendment is read in a way that “reverse incorporates” the Fourteenth Amendment’s Equal Protection Clause into the Fifth Amendment under principles of substantive due process.

In *Hampton v. Mow Sun Wong*, decided in 1976, “each of the five plaintiffs was denied federal employment solely because of his or her alienage.”³⁵⁹ Mow Sun Wong, who had worked as an electrical engineer in China, was “ineligible for employment as a janitor for the General Services Administration” because he was not a citizen of the United States.³⁶⁰ He and four other plaintiffs filed suit against the Chairman and Commissioners of the Civil Service Commission, complaining that “about 300,000 federal jobs become available each year, but noncitizens are not permitted to compete for those jobs except in rare situations when citizens are not available or when a few positions exempted from the competitive civil service are being filled.”³⁶¹ The issue was whether “the advantage given to citizens seeking federal civil service positions is arbitrary, and violates the Due Process Clause of the Fifth Amendment”³⁶² In a 5–4 decision, the Supreme Court decided that the Fifth Amendment had, in fact, been violated. Justice Stevens employed the rational basis, or “levels of scrutiny,” test to make this decision, writing,

equal protection clause as does the Fourteenth Amendment which applies only to the states,” *Bolling*, 347 U.S. at 499, so the Court had to find some way to incorporate its new equal protection doctrine into a provision that was applicable on the federal level.

Chief Justice Earl Warren wrote, “the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,” explaining that “this Court has recognized [that] discrimination may be so unjustifiable as to be violative of due process.” *Id.* (citing for support *Detroit Bank v. United States*, 317 U.S. 329 (1943); *Curran v. Wallace*, 306 U.S. 1 (1939); and *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)). He continued his argument using Fourteenth Amendment rational-basis logic, stating, “Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.” *Bolling*, 347 U.S. at 500.

Finally, he incorporated Fourteenth Amendment thinking into the Fifth Amendment’s Due Process Clause by declaring, “In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools [because of the Fourteenth Amendment’s Equal Protection Clause and the rational basis test], it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Id.*

359. *Hampton*, 426 U.S. at 91.

360. *Id.*

361. *Id.* at 92.

362. *Id.* at 92–93.

[i]ndeed, we deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. It follows that some judicial scrutiny of the deprivation is mandated by the Constitution.³⁶³

Justice Stevens examined the various reasons for these discriminatory laws as provided by the Civil Service Commission—some of which include the claim that “the citizenship requirement has been imposed in the United States with substantial consistency for over 100 years”³⁶⁴ and reliance on a presidential executive order that allowed the Civil Service Commission to establish standards for hiring employees.³⁶⁵ He then declared, “[A]ssuming . . . that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission.”³⁶⁶

Justice Stevens reached this conclusion by explaining that “the impact of the rule on the millions of lawfully admitted resident aliens” was “precisely the same” as the impact of “comparable state rules” which the Supreme Court invalidated in *Sugarman v. Dougall*.³⁶⁷ He then went so far as to say that the Civil Service Commission’s rule requiring citizenship “deprives its members of an aspect of liberty” because the citizenship requirement barred legal aliens from a job with the Civil Service!³⁶⁸

Justice Stevens finished his argument by noting that the legal aliens “were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and

363. *Id.* at 102–03.

364. *Id.* at 104.

365. *Id.* at 111.

366. *Id.* at 116.

367. *Id.* The background for the *Sugarman* case is similar to that of *Hampton v. Mow Sun Wong*: the plaintiffs brought suit because they were excluded from competitive civil service positions in New York City. As this case involved a state government, the Supreme Court was able to employ Fourteenth Amendment equal-protection logic to overturn the case. See *Sugarman v. Dougall*, 413 U.S. 634 (1973). In *Hampton v. Mow Sun Wong*, because the suit involved the national government, Fifth Amendment substantive-due-process logic had to be used.

368. *Hampton*, 426 U.S. at 116.

Naturalization Service acting under the Attorney General of the United States,”³⁶⁹ so any “decision to impose that deprivation of an important liberty” had to be made “at a comparable level of government” to satisfy due-process requirements.³⁷⁰ Justice Stevens held that the Civil Service Commission’s job was not to decide whether aliens could reside and work legally in the United States, and, therefore, they could not unilaterally bar legal aliens from working for the Civil Service.³⁷¹

As with the other alienage cases discussed in this Section, we do not disagree with Justice Stevens’s decision and believe that noncitizens should be hired by the Civil Service Commission and allowed to work for the Civil Service. An originalist reading of the Fifth and Fourteenth Amendments, however, would have been more effective. Justice Stevens based his reasoning on a “judicial scrutiny” test, which seems to mean that he considered each justification for the Civil Service Commission’s discrimination against noncitizens and decided, based on those justifications, whether the discrimination was constitutional. Justice Stevens never defined what, exactly, the varying levels of scrutiny were for purposes of the anti-immigrant discrimination present in *Hampton*, and used only rational-basis ideas to explain why Fifth Amendment substantive due process applies to noncitizens. His scrutiny-based, argument-by-argument approach could be easily torn apart by critics—or any of the four Justices who dissented in *Hampton*—because his logic explaining *why* the Fifth Amendment applies to immigrant citizens is lacking.

However, Justice Stevens’s final statement, “By broadly denying this class substantial opportunities for employment, the Civil Service Commission rule deprives its members of an aspect of liberty,”³⁷² seems more in line with originalist thought. The Fifth Amendment reads, “No person shall be . . . deprived of life, liberty, or property, without due process of law,”³⁷³ so by directly addressing the

369. *Id.* at 116.

370. *Id.* If you think this is somewhat of a convoluted argument, we do too! That is why we would rather these Equal Protection immigration cases be decided using our originalist and textualist approach.

371. *Id.* If, instead of a “comparable level of government,” *id.*, the Civil Service Commission could make the decision to deprive the legal aliens of their liberty to work for the Civil Service, that decision was to be “justified by reasons which are properly the concern of that agency.” *Id.*

372. *Id.*

373. U.S. CONST. amend. V, § 1.

deprivation of noncitizens' liberty present in *Hampton*, Justice Stevens made clear that the Civil Service Commission had violated the Fifth Amendment. Had he undertaken an originalist reading of the Fifth Amendment in the same way we conducted one for the Fourteenth Amendment, his opinion would have been much stronger. If Justice Stevens had explicitly stated in his opinion that immigrant workers qualify as "persons" under the "[n]o person shall" portion of the Fifth Amendment, he would have set a clear precedent for future Justices to follow: noncitizens are still "persons" for questions of Fifth Amendment rights as well as Fourteenth Amendment due process and equal protection issues. Instead, he relied on murky, Lochnerian rational-basis reasoning to strike down the Civil Service Commission's anti-immigrant regulations, skirting around the issue of Fifth Amendment rights as granted to noncitizens.

F. *Nyquist v. Mauclet*

The last alienage case before *Plyler v. Doe*, was the case most factually related to *Plyler* because it, too, dealt with education. *Nyquist v. Mauclet*³⁷⁴ involved a New York statute that barred certain aliens from state financial assistance for higher education.³⁷⁵ A resident alien from France named Jean-Marie Mauclet, who was married to and had a child with a United States citizen, was denied tuition assistance at the State University of New York at Buffalo because he refused to apply for U.S. citizenship at the time of his tuition application—he wished to reside permanently in the United States but retain his French citizenship.³⁷⁶ The Supreme Court recognized that this statute was wrongfully discriminatory but based its decision on the rational basis test.

Justice Blackmun, writing for the majority, stated, "The Court has ruled that classifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny.'"³⁷⁷ The phrase "close judicial scrutiny," as written in *Graham v. Richardson* and interpreted again here, refers to what is, in modern-day Fourteenth Amendment scholarship, the "strict scrutiny" classification. As explained earlier, the rational basis test asks whether

374. 432 U.S. 1, 1 (1977).

375. *Id.* at 4–5.

376. *Id.*

377. *Id.* at 7 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

a state has a “rational basis” for making a law perceived as discriminatory. Under this test, certain types of discrimination merit certain types of “scrutiny” to determine whether they are unconstitutional.

Justice Blackmun applied this test in *Mauclet* and found that, because “resident aliens are obligated to pay their full share of the taxes that support the assistance programs,” there is “no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis.”³⁷⁸ And if aliens can participate equally in programs they pay for, there is no rational basis for denying them financial aid to attend a public university. In other words, “The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others.”³⁷⁹ If the resident aliens had to pay taxes equal to those of citizens, the law had to be applied equally to them under the Equal Protection Clause, according to Justice Blackmun’s “rational basis” test.

However, as explained in our discussion of *Graham v. Richardson*, it makes little sense to hinge an argument upon the shaky and easily misinterpreted rational basis test. While the *Nyquist* Court held that New York had no rational reason to exclude resident aliens from its higher-education tuition-assistance programs, opponents of the case could claim that New York had no fiscal responsibility for these aliens and that their home country should provide them with tuition aid.³⁸⁰ Had *Nyquist v. Mauclet* been decided using our originalist argument—that in 1866 the Equal Protection Clause applied to aliens and even

378. *Id.* at 12.

379. *Id.*

380. Justice Blackmun does in fact address this concern at the very end of the decision by explaining that resident aliens pay taxes to the United States government, though we still believe that he should have just used our originalist method from the start. He says,

Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis. And although an alien may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community. The State surely is not harmed by providing resident aliens the same educational opportunity it offers to others.

Since we hold that the challenged statute violates the Fourteenth Amendment’s equal-protection guarantee, we need not reach appellees’ claim that it also intrudes upon Congress’ comprehensive authority over immigration and naturalization.

Id.

today all aliens deserve equal protection of a state's laws—the Court could have explained that the New York statute barring certain aliens from state tuition assistance did not equally protect the citizens and aliens “within its jurisdiction,” and, consequently, was clearly unconstitutional.

G. *Arizona v. United States*

Though *Arizona v. United States*³⁸¹ took place years after *Plyler v. Doe*, it is a seminal immigration case and should be included in any discussion of immigration issues addressed by the Supreme Court. The issue in *Arizona* was a 2010 Arizona state law called the “Support Our Law Enforcement and Safe Neighborhoods Act” (referred to as S.B. 1070). Its purpose was to “establish an official state policy of ‘attrition through enforcement.’”³⁸² The Court scrutinized four provisions of the law: one creating a state offense for being unlawfully present in the United States (section 3 of S.B. 1070); a second creating a state offense for working or seeking work while not authorized to do so (section 5(C)); a third requiring state and local officers to verify the citizenship or alien status of anyone who was lawfully arrested or detained (section 2(B)); and a fourth authorizing the warrantless arrests of aliens believed to be removable from the United States (section 6).³⁸³

In a 5–3 decision (Justice Kagan recused herself), the Supreme Court held that the first, second, and fourth provisions were preempted by federal law, but the third provision was not. Justice Kennedy, delivering the opinion of the Court, explained, “The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws.”³⁸⁴ He noted, “Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States. Unlawful entry and

381. 132 S. Ct. 2492 (2012).

382. *Id.* at 2497.

383. *Id.* at 2497–98. The district court issued a preliminary injunction to stop these four notably anti-immigrant statutes, and the Court of Appeals for the Ninth Circuit affirmed the district court's decision. Arizona then appealed its case to the Supreme Court.

384. *Id.* at 2499.

unlawful reentry into the country are federal offenses,”³⁸⁵ and “[r]emoval is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials,”³⁸⁶ making Arizona’s attempt to regulate illegal immigration within its borders and remove aliens from the United States unnecessary.

Regarding provision three, however, Justice Kennedy began by stating, “Consultation between federal and state officials is an important feature of the immigration system,”³⁸⁷ indicating that the provision allowing state and local police officers to check the immigration status of already-arrested or already-detained individuals might be constitutional.

He continued, “Congress has done nothing to suggest it is inappropriate to communicate with ICE [U.S. Immigration and Customs Enforcement] in these situations, however.”³⁸⁸ Indeed, it has encouraged the sharing of information about possible immigration violations.”³⁸⁹ Justice Kennedy said that provision three was not preempted by the federal government, but rather “encouraged”: if state and local police officers help identify illegal immigrants via background checks on individuals they have already arrested or detained, that information is useful to the federal government. In other words, “The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter.”³⁹⁰

385. *Id.* at 2499–2500.

386. *Id.* at 2500.

387. *Id.* at 2509.

388. The word “however” was used here because, as Justice Kennedy wrote in the majority opinion, “The United States argues that making status verification mandatory interferes with the federal immigration scheme.” *Id.* Provision three “does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. In other words, the officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed.” *Id.* (citation omitted). Kennedy’s argument rests on the fact that, *contrary to* the United States’ argument, ICE and Congress have actually “encouraged” state and local law enforcement to provide information to ICE in order to alert ICE to “possible immigration violations.”

389. *Id.*

390. *Id.* The full quote, which explains “the federal scheme,” is as follows:

Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U. S. C. §1357(g) (10)(A). A federal statute regulating the public benefits provided to qualified aliens in fact instructs that “no State or local government entity may be prohibited, or in any way restricted, from

Therefore, provision three of Arizona's S.B. 1070 was constitutional even though provisions one, two, and four were not.

Justices Scalia, Thomas, and Alito all concurred in part and dissented in part, though each Justice concurred with different provisions and wrote his own concurrence. Justice Scalia argued that federal law preempted none of the four provisions, stating, "Today's opinion . . . deprives States of what most would consider the defining characteristic of sovereignty: the power to exclude from the sovereign's territory people who have no right to be there."³⁹¹ He continued his discussion of sovereignty, saying, "As a sovereign, Arizona has the inherent power to exclude persons for its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty."³⁹² Justice Scalia then embarked on an originalist journey through legislative history and legal precedent, declaring, "after the adoption of the Constitution there was some doubt about the power of the Federal Government to control immigration, but no doubt about the power of the States to do so."³⁹³ His focus on state sovereignty was not echoed in the concurrences of Justices Thomas or Alito, however.

Justice Thomas stated that all four provisions of S.B. 1070 were constitutional because "there is no conflict between the 'ordinary meanin[g]' of the relevant federal laws and that of the four provisions of Arizona law at issue here."³⁹⁴ He systematically explained how each provision and its corresponding federal laws have the same "ordinary meaning" (i.e. "original meaning," in the sense that we have employed that term in this Article). He also addressed the majority's contention that several provisions of the Arizona law were preempted—because they "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of

sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States." §1644. The federal scheme thus leaves room for a policy requiring state officials to contact ICE as a routine matter.

Id.

391. *Id.* at 2512 (Scalia J., concurring in part and dissenting in part).

392. *Id.*

393. *Id.* at 2517.

394. *Id.* at 2522 (Thomas, J., concurring in part and dissenting in part) (quoting *Wyeth v. Levine*, 555 U.S. 555, 588 (2009)).

Congress”³⁹⁵: “[T]he ‘purposes and objectives’ theory of implied preemption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text.”³⁹⁶

Justice Thomas’s unyielding stance did not appeal to Justice Alito, who strayed from the path forged by his two fellow dissenters when holding in his concurrence that the majority had decided correctly for provisions one and three but incorrectly for provisions two and four.³⁹⁷ Alito agrees that provision three was not preempted because “[t]hat provision does not authorize or require Arizona law enforcement officers to do anything they are not already allowed to do under existing federal law.”³⁹⁸ Similarly, Justice Alito believed provision one was also preempted

by virtue of our decision in *Hines v. Davidowitz*, 312 U.S. 52 (1942). Our conclusion in that case that Congress had enacted an “all-embracing system” of alien registration and that States cannot “enforce additional or auxiliary regulations,” *id.* at 66–67, forecloses Arizona’s attempt here to impose additional, state-law penalties for violations of the federal registration scheme.³⁹⁹

However, Justice Alito says, “I part ways on [provisions two and four],” and argues that, in his view, both of those provisions of Arizona’s S.B. 1070 were in fact constitutional and not preempted by federal law.⁴⁰⁰ He explains:

The Court’s holding on [provision two] is inconsistent with *De Canas v. Bica*, 424 U. S. 351 (1976), which held that employment regulation, even of aliens unlawfully present in the country, is an area of traditional state concern. Because state police powers are implicated here, our precedents require us to presume that federal law does not displace state law unless Congress’ intent to do so is clear and manifest.⁴⁰¹

395. *Id.* (internal citations omitted).

396. *Id.* Here, Justice Thomas’s judicial philosophy, which emphasizes the importance of the original meaning of any text, extends not only to Arizona’s S.B. 1070 but to the entire “purposes and objectives” theory of federal preemption.

397. *Id.* at 2525 (Alito, J., concurring in part and dissenting in part).

398. *Id.* at 2525 (alteration in original).

399. *Id.* at 2525–26.

400. *Id.* at 2525.

401. *Id.* at 2526.

Thus, Justice Alito followed the same federal preemption rhetoric as Justice Kennedy's majority opinion and did not employ the originalist, based-in-legislative-history philosophy that informed Justices Scalia and Thomas when crafting their concurrences.

However, all four of these opinions, majority or dissent, are lacking something: the Equal Protection Clause of the Fourteenth Amendment. *Arizona v. United States* was not brought to the Supreme Court as a question of equal-protection violation—the district court issued its preliminary injunction on the basis of federal preemption—so it is understandable that the Justices did not base their reasoning in equal-protection logic. When employing our originalist reading of the Equal Protection Clause, though, one arrives at the same conclusion that Justice Kennedy's majority did: provisions one, two, and four of S.B. 1070 are unconstitutional while provision three is constitutional.

Provisions one, two, and four each apply the protection of the laws in an unequal manner to citizens and noncitizens: S.B. 1070's provision one makes it an Arizona state offense to be unlawfully present in the United States, which immediately makes all illegal aliens criminals despite the circumstances of their arrival into the United States;⁴⁰² provision two bars all illegal aliens from working or even looking for work by criminalizing those actions, while citizens and legal aliens are allowed to pursue a vocation; and provision four authorizes warrantless arrests of aliens *believed* to be in the United States illegally, robbing the noncitizens of basic rights because of mere suspicion instead of substantiated fact. Provision three does provide equal protection to both noncitizens and citizens, as it requires state and local police officers to verify the citizenship status of *anyone* who might be lawfully arrested or detained, not just aliens (or individuals assumed to be aliens).

Provisions one, two, and four of Arizona's S.B. 1070 treat noncitizens residing illegally in the United States as a separate class of people in the eyes of the law, despite our understanding of the Equal Protection Clause to mean that the equal protection of the laws is granted to *all persons* residing in the United States. This violation of the Fourteenth Amendment indicates that provisions one, two, and four are indeed unconstitutional. An originalist reading of the Equal

402. E.g., what if a young woman was brought against the border illegally as part of a trafficking operation? That young woman would be the victim of a crime—human trafficking—and not a criminal herself.

Protection Clause could easily have substituted for Justice Kennedy's convoluted discussion of precedent and federal preemption that was strongly challenged by the three concurring opinions.

In this analysis of *Arizona v. United States*, it may seem that we are arguing that Arizona (and the federal government) may not treat any person differently even if they are not similarly situated. We do not wish to argue that point in this Article—our aim here is to prove, using originalist theory, that the Equal Protection Clause applies to aliens both legal and illegal. We simply wish to apply this line of argument to *Arizona v. United States* as a thought experiment. We understand that if the Supreme Court had used the rationale explained above, it would have proved a stark departure from current equal-protection doctrine and could result in hundreds of state and federal employment and immigration laws being declared unconstitutional!

However, we believe that there is value in following the words of the Constitution and that there is value in exploring, in an academic context, how the exact words of the Constitution might shed new light on particular legal questions (and better protect the rights of the parties in the cases we have analyzed above). The Constitution is the foundational document upon which our country's entire legal framework is built; if state or federal laws stray too far from its words and meaning, they should be scrutinized and, potentially, struck down.

Justice Thomas, a fellow proponent of originalism, agrees with this line of thinking. In *Department of Transportation v. Ass'n of American Railroads*, he argued, "We have too long abrogated our duty to enforce the separation of powers required by our Constitution. . . . The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects."⁴⁰³ Justice Thomas also quoted Alexander Hamilton, who also seems to have agreed with our reasoning: "It may perhaps be said that the power of preventing bad laws includes that of preventing good ones . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."⁴⁰⁴ In using our originalist reading of the Equal Protection Clause to "defeat" three provisions of Arizona's S.B. 1070, we merely want to ensure that the words of the

403. 135 S. Ct. 1225, 1254–55 (2015).

404. *Id.* at 1252 (quoting THE FEDERALIST NO. 73 (Alexander Hamilton)).

Constitution's Fourteenth Amendment are being closely followed and build a framework to prevent future "bad" provisions regarding immigration.

In conclusion, and to turn back to this Article's purpose, each of the cases we have analyzed here involved statutes that violated the Equal Protection Clause because they did not apply equally to "any persons," aliens, or citizens, that were "within the jurisdiction" of the state that created them. We agree with each case's outcome. Had all of the cases been decided using the argument that we have put forth in this Article, however, the rights that each decision granted to aliens in the United States would have been much more secure. The rational-basis defense introduced to Fourteenth Amendment alienage scholarship creates a series of classifications that are difficult to follow and easy to debate. By contrast, our originalist dissection of the Fourteenth Amendment clearly explains how the Equal Protection Clause applies to aliens and can be used to protect them from questionable statutes.

V. CONCLUSION

In 2010, the late Justice Antonin Scalia said, "My burden is not to show that originalism is perfect, but that it beats the other alternatives, and that, believe me, is not difficult."⁴⁰⁵ We agree with Justice Scalia, and hope we have borne that burden well in this Article. In the case of alienage, it is difficult to secure constitutional rights via judicial interpretivism because the United States' attitude toward aliens is ever-changing—the evolution of federal immigration law over time is evidence enough of that. Instead, we believe that courts can use originalism instead of judicial interpretivism to secure constitutional rights for aliens in the United States, even (and especially!) if those aliens are the children of "illegal immigrants."

The text of the Fourteenth Amendment is immutable, and the definitions of the words at the time of the amendment's framing and ratification from 1866–68 cannot possibly change. This immutable Fourteenth Amendment text, specifically the Equal Protection Clause, applies to aliens; we demonstrated this by using textualism in Part II

405. Justice Antonin Scalia, Remarks at University of Virginia School of Law Lecture Sponsored by the Thomas Jefferson Center for the Protection of Freedom of Expression (Apr. 16, 2010), *in* U. VA. SCHOOL L., (Apr. 20, 2010), http://content.law.virginia.edu/news/2010_spr/scalia.htm.

and by supporting that textual analysis with legislative history in Part III. An originalist reading of the Equal Protection Clause will withstand the test of time. It is our fervent hope that, whatever attitude the United States may take toward aliens in the coming years, an originalist reading of the Equal Protection Clause will be used to protect the rights of both illegal and legal aliens for the foreseeable future.

